In the Supreme Court of the United States

OCTOBER TERM, 1904.

SAN FRANCISCO NATIONAL BANK,
Appellant,

vs.

WASHINGTON DODGE, AS ASSESSOR OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA,
Appellee.

No. 44.

PETITION FOR REHEARING.

To the Supreme Court of the United States:

Your petitioner, as Assessor of the City and County of San Francisco, State of California, appellee, respectfully prays for an order directing a re-argument of the above-entitled cause, and as grounds therefor specifies:

First: That said decision is predicated upon a misinterpretation of the statutes and decisions of California, and denies to that State, under such misinterpretation, the exercise of a material fact of its sovereign power of taxation;

Second: That said decision will have the effect not only of relieving from taxation the shares of stock of national banking associations within her borders, but of unsettling and denying a rule of assessment of the shares of stock of her own corporations recognized, acted upon and sustained by her courts for over thirty years;

Third: That the issues upon which this case was decided are not within the pleadings and were not considered by the Court below as such, as appears from the decision of the Circuit Court of Appeals, given in the companion case of *Nevada National Bank* vs. *Dodge,* 119 Fed. Rep., 57, and by the argument of solicitors for appellant;

Fourth: That the appellee believes, and is so advised by his counsel, that a further consideration of this case and of the arguments which will be advanced in support of the judgment of the Circuit Courts will lead this Honorable Court to a decision in favor of the appellee;

Fifth: That appellant was without ground for complaint, inasmuch as its stockholders were taxed only upon the actual value of its tangible property, whereas the State banks and other moneyed corporations were taxed in excess thereof;

Sixth: That this Honorable Court, sitting in Equity, has erroneously assumed jurisdiction of a cause, cognizable only at law, and has erroneously issued an injunction to restrain the collection of a tax

on the sole ground of its illegality, contrary to equity and the precedents of this Court.

And your petitioner respectfully asks for an attentive, individual consideration of the argument following, in which an attempt is made to more fully state and to support the grounds above mentioned; and he further prays that the above-entitled cause be set down for re-argument before this Court upon some day by it to be appointed.

And as in duty bound will ever pray.

PERCY V. LONG,
W. I. BROBECK,
Counsel for Appellee.

We certify that, in our opinion, the foregoing petition for a rehearing is well founded.

PERCY V. LONG,
W. I. BROBECK,
Counsel for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

THE SAN FRANCISCO NATIONAL BANK,
Appellant,

vs.

WASHINGTON DODGE, AS ASSESSOR OF THE CITY AND COUNTY OF SAN FRANCISCO,
Appellee.

ARGUMENT ON PETITION FOR REHEARING.

A case of unusual importance to the proper exercise by a sovereign State of the all-essential power of taxation has been erroneously decided. "A grievous "wrong is done to the State of California." Confident in the belief that she had done all and more than the most exacting could require in affording protection to the National Banking Associations within her taxing jurisdiction, through one of her assessing officers, the State of California submitted to the final determination of this Supreme Court the controlling question whether, under her constitution and statutes, as expressly declared and interpreted by her own and

the Circuit Courts of the United States, she had not dealt fairly with such associations. The answer given by this Court not only does the State "a grievous wrong", through the misconstruction of her motives and of her laws, but it has had the unexpected and unnecessarily wrongful effect of unsettling a principle under which, for twenty years, she has taxed her own corporations of all classes, and cast doubt upon a heretofore accepted and acknowledged power necessary to that end.

We are advised of the necessity which supports the practice obtaining in this Court of turning an unwilling ear to petitions for a second consideration of a cause already considered and determined. So ample are the opportunities afforded, under our liberal methods of procedure, for the presentation, in the first instance, of a cause on appeal, that occasions must be rare in which a request for a rehearing should be presented. Such instances do occur, however, in which it would be a positive denial of justice, not only to the parties litigant, but to others, were the original decision permitted to stand as the rule of the case and the law of the land; and this Court has recognized the possibility of being itself in error and of correcting the same by making provision in its rules whereby an opportunity is afforded the unsuccessful party of pointing out wherein the error consists and requesting its correction. And in no event can the considerations moving to that end be more forcefully

suggested than in one of that great class of cases in which the taxing power of a sovereign State is being denied, not only in relation to the governmental agencies engaged in competitive business within her boundaries, but, a more serious consideration, by the assumption by this Court of the interpretation of the tax laws of the State in their relation to her domestic affairs, far from all federal concern, and where such assumption results in an actual misinterpretation of such laws to her manifest injury.

It has been the law of California, controlling the taxation of corporate property and shares of stock subject to her taxing power, since 1872, (with the exception of a single year, from March 22, 1880, [Amendment to Codes, 1880, p. 10] to March 7, 1881, [Stats. 1881, p. 59]), that such taxation should be directed against the corporate property, including the franchise and all other elements entering into and constituting the value of such shares. Since *Burke* vs. *Badlam,* 57 Cal., 594, decided January, 1881, no one has questioned that rule of assessment, with the single exception of the Bank of California in *Bank of California* vs. *San Francisco,* 142 Cal., 246, and in that instance unsuccessfully. It was, therefore, with a sense of profound surprise, that the ruling of this Court was discovered to be, what has been unknown and unrecognized in California for over forty years, that is, that the State of of California had actually omitted to make provision for the taxa-

tion of the shares of stock of its corporations at their full value. It must be admitted that, if true, this reveals a most remarkable condition of affairs. That such a large body of taxable wealth should be relieved from taxation is a reflection upon the lawgivers of a State that has addressed itself with some attention to this most important subject. Such a condition may be described as so remarkable as to leave some doubt, even after the close analysis given the subject by a majority opinion of this Court, as to whether it is legally true. Imbued as we are with the knowledge of the workings of that system and its results, we are constrained to deny that the tax laws of California admit of any such interpretation, or that the Supreme Court of that State has been guilty of attributing any such construction to them. Whatever doubt may have arisen from the reasoning of the majority opinion of this Court has been entirely removed by an examination of the conclusions stated in the minority opinion, familiar as we are with the tax system of California and its operation.

It is for the purpose, therefore, of sustaining not only the power of the State of California to tax the shares of stock of National Banking Associations in the manner now provided, but, more important still, of maintaining the integrity of the system of taxation of her own corporations, that we ask a further consideration of this cause. With this two-fold purpose in view, we proceed to an analysis of the reasons

which have prompted the majority of this Court to reverse the judgment.

I.

STATING THE QUESTION.

Although the Court is found to be divided, five Associate Justices concurring in the majority opinion, and the Chief Justice and three Associate Justices concurring in the minority views of the Court, all unite in the view that the many contentions advanced by the Appellant Bank are "without merit" with a single exception. It is the cardinal error of the majority opinion that the laws of the State of California do not require, in the assessment and taxation of the shares of stock of California corporations, that all the elements of value which combined constitute the market value of such stock, should be assessed and taxed to the corporation.

With respect to the contentions advanced against the validity of the Act of 1899, under which the assessment was made, the majority opinion says:

> "Many contentions were argued at bar involving the assertion that the State law was invalid because of deductions of debts or exempt property which it was asserted, the law allows to state banks and other moneyed corporations on an assessment of their property and does not allow holders of shares of stock in natonal banks. Most of these contentions are in effect disposed of by the consideration which we have given to the proposition that the State law was void simply because it established different methods of taxation as to the two classes of corpora-

tions. In so far as the contentions are not in fact disposed of by our conclusions on that subject, we content ourself with saying that we think all such propositions were rightly decided by the court below to be without merit for the reasons expressed in the opinion delivered by that court in the *Nevada Bank case*, to which the Court referred and upon which it placed its ruling."

Nevada National Bank vs. *Dodge*, 119 Fed., 57.

And this view is confirmed by the minority opinion.

Every contention, therefore, made by counsel for the Assessor Appellee, in their brief in this case has been sustained, save one.

The majority opinion maintains that this single exception is within the issues of the case, while the minority view of the Court is that it is without such issues.

On behalf of Appellant Bank it was insisted that no taxation of the shares of stock of a national banking association was possible in California until provision had been made by statute for the direct taxation of the shares of stock of competing California corporations. On the part of Appellee Assessor, it was asserted in reply that the State was not required to change her system of taxation of shares of her own corporations in order to effect the taxation of national bank stock, that the taxation of all the property of corporations organized under her laws was the equivalent of the taxation of the shares of such

corporations, and satisfied the requirements of the Acts of Congress (Sec. 5219, Rev. Stats.) that national bank stock should not be assessed at a greater rate than other competing moneyed capital. This Court unanimously so held. Affirming *Davenport National Bank* vs. *Board of Equalization,* 123 U. S., 83, it was again announced that Section 5219 of the Revised Statutes "did not require the States, in taxing their own corporations, to conform to the system of taxing national banks upon the shares of their stock in the hands of their owners."

In this view the majority opinion concedes that: "No conflict necessarily arises between the Act of Congress and the State law, solely because the latter provides one method for taxation of State banks and other moneyed corporations and another method for national banks"; and it is held to follow that the contention that the State law for that reason is repugnant to the Act of Congress is without merit." The author of the majority opinion then proceeds to consider whether the California method for the taxation of domestic stock requires that there should be taken into account the good will of the corporation as elements in fixing the value of the property of the corporation represented in the market value of its stock.

That the good will, dividend or profit-earning power of a corporation is assessed under the California system was insisted by counsel for appellee and

the proposition as stated by counsel for appellee and quoted in the majority opinion, was stated thus:

> "Under the California system, all the property of California corporations is assessed, including their franchises. It is frequently the case that the market value of the stock of the corporation is greatly in excess of the value of its property, other than its franchise. This fact was called to the attention of the State Court, which recognized the force of this suggestion, and held the Constitution and laws of the State require the assessment and taxation of the franchise of the corporation, and that its value, for the purpose of such assessment and taxation, was properly ascertained by deducting from the market value of its stock the value of its corporate property and assessing the remainder as franchise."

The author of the majority opinion, commenting on this view, makes the following concession:

> "It may be conceded that if the statutes have been interpreted by the Supreme Court of the State as thus asserted, and that as so interpreted they have been applied by the assessing officers, there would be an end to the discriminations which we have seen arise from the consideration of the result of the statutes when not so interpreted."

And the question in its last analysis, is declared to be: "Do the decisions of the Supreme Court of "California, as contended, place the positive duty on "the assessor of including in an assessment of the "franchises of State corporations, all the elements of "value which form part of the market or selling "value of shares of stock?"

Accepting, for the time, the view of the majority that this is the question to be determined, we pass to a discussion of that question.

II.

WHAT THE LAW OF CALIFORNIA REQUIRES TO BE TAXED.

The State of California, in the enforcement of her tax laws, has met with considerable difficulty. The original Constitution for a State government was proclaimed December 20, 1849, and, in line with the provisions found in the constitutions of most of the States, the simple provision is found therein requiring taxation to be "equal and uniform throughout the State," and that "all property in this State shall "be taxed in proportion to its value to be ascer- "tained as directed by law." (Sec. 13, Art. XI, Constitution of California, 1849.) No definition of what constituted property was attempted.

In interpretation of this clause, the State Supreme Court, in *People* vs. *McCreery,* 34 Cal., 455; after quoting the language, said: "Construction or inter- "pretation can scarcely make the meaning of the "words more apparent, for there is no word in the "clause of ambiguous or doubtful import."

People vs. *Eddy,* 43 Cal., 331.

But it was afterwards held, in a case that was thereafter described as being without authority at home or respect abroad, that credits were not property and could not be taxed. *(People* vs. *Hibernia S. & L. Soc.,* 51 Cal., 244, and *Savings and Loan Soc.* vs. *Austin,* 46 Cal., 495.) Few cases have ex-

cited so much criticism in California and elsewhere. (*Burrough on Taxation,* p. 50; *Lamar* vs. *Palmer,* 18 Fla., 149-150; *New Orleans* vs. *Insurance Company,* 30 La. Am., 877; *State* vs. *Carson City Bank,* 17 Nev., 149.) and to that remarkable ruling may be ascribed the fact that soon thereafter, on May 7, 1879, a new Constitution, having been ratified by the people, was proclaimed. In substitution for the modest two or three sentences in the Constitution of 1849 relating to taxation, there was inserted in the Constitution of 1879 an entire article devoted to "Revenue and Taxation" and numbered "XIII," Section I of which article assumes to determine what property is liable to taxation. It reads:

> "All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership; provided, that property used for free public libraries and free museums, growing crops, property used exclusively for public schools, and such as may belong to the Unitetd States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this State."

Following the precedent in such matters, it declares "all property in the State, not exempt under " the laws of the United States, shall be taxed in " proportion to its value, to be ascertained as provid-

"ed by law." The fact that the Constitution requires that "all property shall be taxed" is sufficient, in the view of most Courts, to subject every class and kind of property within the taxing jurisdiction of the State and not expressly exempt, to its just share of the burdens of government. Indeed, most State Constitutions go no further; and the Courts have been left in no doubt as to the meaning of so unequivocal a command. A lesson had been learned by the people of California, however, in their failure to specifically describe what properties should be taxed, and the influence of that teaching was felt not only in the convening of the convention and in the enlargement of the provisions of the State Constitution relating to revenue and taxation, but in the addition of a definition of what should thereafter be regarded as "property" for the purposes of revenue and taxation. Section 1 of Article XIII of the Constitution of 1879 accordingly provides:

> "The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, *stocks*, dues, *franchises*, and *all the matters and things, real, personal and mixed, capable of private ownership.*"

A more comprehensive definition could not be drawn. Laboring under the influence of a recent ruling, which had the effect of exempting from taxation a great portion of the credit wealth of the State, the framers of the Constitution exerted their utmost endeavors to include within the definition of taxable

property all "matters and things, real, personal and mixed, capable of private ownership." It may not be doubted that one of the primary purposes designed to be accomplished thereby was to withdraw from the uncertainty of judicial construction and interpretation, all questions as to what was intended to be taxed, and to subject all property to taxation. If possible the requirement that all property should be taxed, which was not expressly exempted, was made more emphatic by an express enumeration, in the same section, of such properties as were to be exempt. It was provided that "property used for free public "libraries and free museums, growing crops, prop- "erty used exclusively for public schools, and such "as may belong to the United States, this State, or to "any county or municipal corporation within this "State, shall be exempt from taxation." (Sec. 1, Art. XIII, Const. 1879.)

Not only, therefore, does the constitution command the taxation of all property, as that term is defined therein, but it assumes itself to specify such property, and such property *only*, as is exempt therefrom. Nothing is left to judicial construction. Nothing remains for the play of legislative discretion.

As the Supreme Court of California said, in *Mackay* vs. *San Francisco*, 113 Cal., 397, 401, in considering the taxability of bonds:

"The Constitution not only provides that all 'property' shall be taxed, but defines the word 'property' and expressly includes *bonds* in that definition, thus placing it beyond the power of the Legislature or the Courts to say that bonds are not property within the meaning and intent of the Constitution."

The same is true of "stocks." The Constitution has expressly declared "stocks" to be taxable in California and has thereby withdrawn from legislative or judicial consideration the question whether stocks shall be taxed. Stocks are required to be taxed "in " proporition to their value, to be ascertained as pro- " vided by law."

This portion of this section (Sec. 1, Art. XIII) of the Constitution is not self-executing.

McHenry vs. *Donner*, 116 Cal., 25.

And, as the majority opinion agrees:

"Carrying out the command to provide for the ascertainment of the value of property to be taxed, it was enacted (Political Code, Sec. 3627) that all taxable property shall be assessed 'at its full cash value,' and (Political Code, Sec. 3617) that the terms 'value' and 'full cash' means the amount at which the property would be taken in payment of a just debt due from a solvent debtor."

This is the "yard stick" by which the values of all properties are to be measured for taxation; the value of the corporate property; the value of shares of stock; as well as horses and chattels; *shares of stock in State banks as well as in national banks;* "all property."

The law of California requires, therefore, that the

stock of corporations should be taxed "at its full cash "value, i. e., the amount at which it would be taken "in payment of a just debt due from a solvent "debtor."

Such is the positive law of the State. The author of the majority opinion says: "In the argument at "bar no law of the State was referred to requiring "that the assessing officers in valuing the property "of a corporation should assess as property its good "will, its dividend-earning power, the confidence re- "posed in its officers, etc." All of the laws to which we have referred were called to the Court's attention and are referred to in the majority and minority opinions. And such laws make it the imperative duty of the assessing officer to assess all stock at its full cash value. The law imposing such a duty upon such officers appears to be too plain for misinterpretation.

To repeat.—The Constitution requires all stock to be taxed in proportion to its value, to be ascertained as provided by law. The law declares that such value is ascertained where the full cash value is ascertained, that is, the value at which the stock would be taken by a creditor in payment of a just debt due from a solvent debtor. The conclusion is irresistible that stock is required to be assessed in California at its full cash value. The majority opinion holds the true cash value to be the "market or selling value."

What escape is there from the conclusion that the Constitution and statutes of California make it imperative that stock should be assessed at its market value? There is none.

The shares of stock of national banking associations "shall be valued and assessed as is other property for taxation" (Pol. Code, Sec. 3809), which property includes shares of stock of State banking and other moneyed corporations.

Does any one suggest for a moment that the Legislature of California could constitutionally exempt, either directly or indirectly, the shares of stock of California corporations from assessment and taxation in proportion to their value? Certainly not. Does any one suppose for a moment that the Legislature of California could *partially* exempt the shares of stock of California corporations from taxation in proportion to their value? Certainly not.

Any statute attempting either a whole or a partial exemption of such stock, or any other property in California, would be so manifestly unconstitutional as to afford no assessing officer any excuse for obeying. The law no more countenances partial than total exemptions.

But, nothwithstanding these legal conclusions amount to a legal demonstration, the majority of this Court finds that such a partial exemption exists and is so far sanctioned by the law of California as to make a statute, conceded to be valid on its face, in-

valid in its operation. Let us see if this can be so. That it is so is attributed to but one thing, namely, that, in the assessment of the State of California corporations there is not included, as an element of value, the good will, dividend or profit-earning faculties of the corporation. If that be true, it can only be so on the ground that good will is not a property of the corporation, for no one can have the hardihood to maintain that the laws of California do not require the assessment of all the property of the corporation. That it is not a matter or thing, real, personal, or mixed, capable of private ownership. As the majority opinion concedes that the Constitution and statutes of California do require that all the property of a corporation be taxed, and that such a method of reaching the stock would satisfy the requirements of Section 5219 of the Revised Statutes, if all the elements of value were so assessed to the corporation, it may be of advantage to consider the method employed in reaching and taxing such value.

III.

ALL ELEMENTS ENTERING INTO AND CONSTITUTING THE VALUE OF STOCK OF CALIFORNIA CORPORATIONS IS TAXED, AND IS IMPERATIVELY REQUIRED TO BE TAXED, BY THE LAWS OF THAT STATE.

No doubt could exist on this subject in the mind of the author of the majority opinion, as in fact no doubt has ever existed in California, were it not for

the provisions of the law of California, under which the tax is imposed directly upon the property and other elements of value constituting the value of the stock of the corporation, and so but indirectly upon the stock.

The author of the majority opinion is in error in so far as he asserts that "Prior to 1881 shares of stock of all corporations were taxed." From the earliest time, it was provided in California that "the owner "or holder of stock in any incorporated company "liable to taxation on its capital, shall not be taxed as "an individual for such stock" (Sec. 7, Act of March 30, 1850, p. 135). The same Act, in Sec. 73 to 84 thereof, made provision for taxing the property of incorporated companies. Though variously amended and re-enacted (Stats. 1851, p. 153; Stats. 1853, p. 669; Stats. 1857, p. 1861) the law so remained without material change until the codification of the laws in 1872, and the adoption of such codification March 12th of that year, when section 7 of the Act of 1850 was inserted in the Political Code, numbered 3640 and made to read as follows:

> "The owner or holder of stock in any firm or corporation, the entire capital or property whereof is assessed, must not be assessed individually for his stock in such firm or corporation."

And in the succeeding section (3641), it was provided:

> "The property of every firm and corporation must be assessed in the county where the property is situate, and must be assessed in the name of the firm or corporation."

No further change in the law was attempted until March 22, 1880 (Amendments to the Codes, 1880, p. 10), when the Legislature of that year amended section 3640 of the Political Code, to read as follows:

> "Each person, firm, or corporation owning or having in his or its possession any of the shares of the capital stock of any corporation, association, or joint stock company, shall be assessed therefor. If the corporation, association, or joint stock company has its principal place of business in this State, the assessable value of each share of its stock shall be ascertained by taking from the market value of its entire capital stock the value of all property assessed to it, and dividing the remainder by the entire number of shares into which its capital stock is divided. The owner or holder of capital stock in corporations, associations, and joint stock companies whose principal place of business is not within the State, must be individually assessed for such stock. Shareholders, in the statement required by section three thousand six hundred and twenty-nine of this Code, shall specify the number of shares of stock held by them, and the name of the corporation. The owners of shares of stock to be entitled to the deduction provided for in this section, must produce to the Assessor a certificate of the assessment of the property of the corporation, association, or joint stock company."

Even this amendment did not require the assessment of the shares of stock of California corporations directly and at their full value, but directed that the assessable value of each share of stock shall be ascertained by taking from the aggregate market value of such stock the value of all property assessed to the corporation, and dividing the remainder by the entire number of shares into which the capital stock is divided. That was but another way of getting at the franchise value as it entered into the

stock and was not a substantial departure from the method theretofor for thirty years obtaining in California.

An attempt was made to assess national bank stock under this amendment of 1880, but failed under the decision of the State Supreme Court in *Miller* vs. *Heilbron,* 58 Cal., 133, being declared void upon a premise which the opinion in this case finds to be untenable. Before *Miller* vs. *Heilbron* was decided, however, the Legislature of 1881 had convened, and an Act approved March 7 of that year, removed any doubt of the policy of the State in its treatment of the shares of its corporations for purposes of taxation, by repealing section 3540, as amended March 22, 1880, and by adding a new section to the Code, numbered 3608 (Stats. 1881, p. 56). The amendment of 1880 was in effect, therefore, less than a year, when it was entirely repealed, and 3608 was added to the Code in substitution for it. About 3608 there was nothing equivocal. It marched straight up to the constitutional requirements that stock should be taxed at its full cash value, *i. e.,* the value at which it would be accepted by a creditor in payment of a just debt due from a solvent debtor, and affirmatively declared that such stock possessed "no " intrinsic value over and above the actual value of " the property of the corporation which they stand " for and represent, and the assessment and taxation " of such shares and also of the corporate property

"would be double taxation. Therefore," declares the statute, "all property belonging to corporations "shall be assessed and taxed, but no assessment shall "be made of shares of stock, nor shall any holder "thereof be taxed therefor."

In the meantime, however, the people had, in May, 1879, ratified a new constitution, Section 1 of Article XIII of which, as we have seen, imposed taxation upon "all property in the State not exempt under the laws of the United States," and had so defined the word "property" as to include "stocks, "franchises, and all other matters and things, real, "personal, and mixed, capable of private owner- "ship." At the time this Constitution was ratified, Section 3627 of the Political Code commanded, "all property must be assessed at its full cash value," and by subdivision fourth of Section 3617 of the same Code, "full cash value" was defined to be "the amount at which the property would be ap- "praised if taken in payment of a just debt due from "a solvent debtor." Lest there should be any doubt whether the Legislature had provided by law for ascertaining the value of taxable property, Section 3617 was re-enacted in an amended form, at the first session of the Legislature following the ratification of the Constitution (Amendments to the Codes, 1880, pp. 5-6) to read as follows:

"Fifth. The true 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor,"

and so the law provides to-day.

When, therefore, the Constitution of 1879 commanded that all property, including stocks, should be "taxed in proportion to its value," that term had received a definition in the laws of the State in the light of which the term was advisedly used in that instrument. Such is the rule of construction generally recognized, (Sutherland, Statutory Construction, Sec. 253 and cases cited), and such is the rule applied by the Supreme Court of California to its Constitution (*Cameron* vs. *Kentfield,* 57 Cal., 550).

This constitutional provision must be held, therefore, to require the taxation of stock at its full cash value. It was so interpreted by the Legislature that met immediately thereafter (Amendments to the Codes, 1880, p. 56). It follows, as day follows night, that any statute attempting the exemption of stock from taxation at its full cash value, *although such attempted exemption might be but partial,* would be unconstitutional and void.

When, in this condition of the law, Section 3608 was added to the Political Code, in 1881 (Stats. 1881, p. 56), it was quite natural that some question should be raised as to the constitutionality of a provision which relieved stock from taxation directly and taxed it only indirectly. A case was prepared

to test the question. An original application was made to the State Supreme Court for a writ of mandate commanding and requiring the Assessor of San Francisco to assess to various holders of certificates of stock in various corporations the respective shares held by them. That the question might be thoroughly tested in all its bearings certificates of stock of the Nevada Bank of San Francisco (then a State bank), of the San Francisco Gas Light Company, of the Golden City Chemical Works, of the Selby Smelting and Lead Company, and of the Virginia and Gold Hill Water Company, were all included in the demand for their assessment. A greater variety of corporations it would be difficult to unite in one proceeding. The case was entitled *Burke* vs. *Badlam*, and there was called to its consideration the leading members of the California bar, including Senator F. G. Newlands, Creed Haymond, who had but recently revised and codified the laws of the State; Mr. Hall McAllister, to whose memory the bar of California has but recently erected an impressive memorial, and others less famous but scarcely less able. These gentlemen, bringing to the assistance of the Court the best that the bar boasted, took the unanimous position, in support of the Act, that it was constitutional because every element of value of the share was by law required to be taxed to the corporation; and that, as the Constitution did not permit double taxation, this satisfied its mandate that the

stock should be taxed at its full cash value. In the leading opinion, written by Mr. Justice Ross, now and for many years United States Circuit Judge for the Southern District of the Ninth Circuit, that interpretation is placed upon the Constitution and laws of California, which is now denied by the majority opinion of this Court, to wit:

> *"To assess all of the corporate property of the corporation,* and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same porperty twice, once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each." (Italics are ours.)
>
> *Burke* vs. *Badlam,* 57 Cal., 601.

This was, of course, a substantial restatement of the provisions of Section 3608. What did the Court, and so the statute, mean by *"all the corporate property?"* After holding that it would be as much double taxation to tax shares of stock, as requested by plaintiff, as it would to tax all the property of a partnership to the firm and at the same time tax the same property to the individual members of the firm, the Court says: "In the case of corporations, take away " all of its property, which, it must be remembered, " includes its franchise, and the stockholder no " longer has the property. * * * In the case of " the corporations to which we have referred, " the Legislature has declared that all of the " property held by such corporation shall be assessed

" to them. It has not attempted to exempt any prop-
" erty from taxation not exempt by the Constitution
" itself, and of course could not do it if it had. It
" has only said that the property shall be assessed to
" the corporation, and shall not be again assessed for
" the same tax."

The Court recognized the fact that the law required "stock" to be taxed at its full cash value. From this requirement no escape existed. Stock could not be assessed at less than its full cash value. It could not be so assessed directly; it was equally true it could not be so assessed indirectly. Any attempt to do so would be unconstitutional. The full cash value, says this Court, is the market or selling value. To assess stock at its full cash value through an assessment of the property of the corporation was held by the Supreme Court of California in this case, not only to be possible but to be required by positive law.

That certificates of stock are merely muniments and evidence of the holder's title to a described share or interest in the property and franchise of the corporation has long been the recognized rule of decision in this Court.

Bayley vs. *Railroad Co.*, 22 Wall., 636.
Miller vs. *U. S.*, 11 Wall., 297.
Deleman vs. *R. R. Tax Case*, 18 Wall., 229.

"What," says the Court, "is the stock of a corporation but its property—consisting of its franchise and such other property as the corporation may own? Of what else does its stock

consist? If all this is taken away, what remains? *Obviously nothing.* When, therefore, all of the property of the corporation is assessed—*its franchise and all of its other property of every character*—then all of the stock of the corporation is assessed, and the mandate of the Constitution *is complied with.*" (The italics are ours.)

What is the mandate of the Constitution that is complied with—the mandate that stock shall be assessed in proportion to its "value," to wit: its "full cash value"?

All of the Justices, except Mr. Justice Morrison, concur. Mr. Justice McKinstry, following the lines of Mr. Justice Ross' reasoning, says:

"The Constitution declares the 'stocks' and 'franchises' shall be included in the word 'property' and that all property shall be taxed 'in proportion to its value.' But the Constitution does not require that stocks or franchises shall be *twice* taxed. When the aggregate value of all the shares of stock is taxed to the corporation, the real and personal property and the franchise is ordinarily included in the tax; certainly when the stock, franchise, and other property are taxed to the corporation, everything required by the Constitution to be taxed *is* taxed; and this whether one of these subjects of taxation includes the others or not. The statute provides that shares of stock shall not be assessed to the holders. *Why should they be if the 'property' which is assessed to the corporation includes the anticipated profits from the enjoyment of the franchise, and all other elements of value which go give value to the shares of stock?*" (Italics are ours.)

This is said in further explanation of the holding of Mr. Justice Ross, and defines the law of California to require that the profit-earning power and the good will, which must be included in "all other ele-

" ments of value which go to give value to the shares " of stock," should be assessed to the corporation. In view of that requirement of the California law, as held by the majority of the Court, he found it possible to concur in a judgment which relieved stock from direct assessment and taxation. Upon no other theory could the section of the Code be held constitutional. These elements of value were to be considered in valuing the franchise of the corporation, as this and other Courts have repeatedly held possible.

Hamilton County vs. *Massachusetts,* 6 Wall., 632-640.

Home Ins. Co. vs. *New York,* 134 U. S., 604-605.

People vs. *Roberts,* 154 N. Y., 101.

Wherever it was impossible to reach the property of the corporation, including its franchise, there could be no exemption of the stock of the corporation from direct assessment. In that case the stock was required to be assessed. The same Court so held in *San Francisco* vs. *Fry,* 63 Cal., 570, and *San Francisco* vs. *Flood,* 64 Cal., 507. In the latter case the Court reiterated the ruling that shares of stock were exempt from direct assessment only "where the en- " tire capital or property of the corporation, in " which the shares are owned, is assessed, and it does " not appear that the corporation or corporations, in

" which the shares here assessed were owned, were " assessed at all during the fiscal year for which the " assessment herein was made."

But there can be no doubt of the meaning of *Burke* vs. *Badlam*. It has stood for twenty years in California as an interpretation of the laws of that State, and has been accepted by both State and Federal Courts as holding to the doctrine stated. We are aware that the learned author of the majority opinion does not give us credit for having cited it to the point being discussed, and does himself ignore it from this point of view, but a casual reading of the brief for appellee will convince the Court of that error, and, on the oral argument, the case was so strongly relied upon as to suggest an inquiry from Mr. Justice Holmes as to its holding. Be that as it may, the case was before the Court and considered. Its true meaning had been doubted here for the first time. In *San Francisco* vs. *Mackay*, 10 Sawyer, 302; 22 Fed. Rep., 602, decided three years after *Burke* vs. *Badlam,* the view of appellee as to its significance and legal conclusions are sustained and applied. It was similarly interpreted by the Circuit Court of Appeals, in *Nevada National Bank* vs. *Dodge,* 119 Fed., 57. The Supreme Court of North Carolina, in *Railroad* vs. *Commissioners,* 91 N. C., 459, said of it:

"The decision rests upon the proposition that corporate property of every kind exposed to taxation is represented in the value

of the stock, and whether the tax be levied upon the one or the other, it is but *ad valorem* tax, and to levy it upon both at the same time would be to duplicate it, and thus disregard the restraints of the Constitution."

And in the Supreme Court of California, how has this case been regarded?

At the same time at which *Burke* vs. *Badlam* was decided, and while this subject was fresh in the minds of the Justices, an appeal reached them involving the validity of an assessment levied upon the franchise of the San Jose Gas Company, from the record in which it appeared, among other matters, "that the assessor assessed the franchise of plaintiff "at $130,000, in making which valuation he estimated the combined aggregate market value of the "shares of the capital stock of the corporation, held "and owned by the shareholders, at $240,000, and "from that aggregate deducted the combined aggregate value of all the taxable property of the corporation * * * and found the result $130,000, "and assessed the franchise at that sum." Injunction was sought to restrain the collection of the tax thereon in *San Jose Gas Co.* vs. *January,* 57 Cal., 614. Two grounds were stated in the opinion for affirmance of the judgment denying the writ, the second of which concerned the franchise tax. After holding a franchise to be property and assessable as such, the Court says:

"The method of assessment, and by whom, has to be and was provided for by law. Therefore, it does not rest with the

plaintiff or with the courts to determine that the franchise has no value. In a pecuniary sense, the value of franchises may be as various as the objects for which they exist, and the methods by which they are employed, and may change with every moment of time; but that franchises are property, and are to be taxed in some method in proportion to value, is a part of the paramount law of this State."

Of this case the majority opinion says: "The case "simply decided that where a part of a tax was as- "serted to be illegal and a part was admitted to be "valid, the duty existed to pay the confessedly legal "part to justify relief concerning the portion claim- "ed to be illegal." Such was undoubtedly one of the grounds stated for sustaining the judgment, and was sufficient in itself to do so, but another and a second ground was stated to the same purpose, as quoted above. That there may be more than one ground stated for the same conclusion without making either or both *obiter dictum* will hardly be disputed; and when two reasons are assigned for the same judgment this Court will not put us to an election as to which we may cite as the authoritative determination of the Court. To be put to an election of which one of two premises, either of which would be sufficient to sustain the conclusion of the Court, is *obiter*, would result in the conclusion being without any authoritative support.

Accepted, therefore, as an authoritative expression of the Supreme Court of California, in association, both in time of delivery and subject matter with

Burke vs. *Badlam,* there is no escape from the conclusion that the Supreme Court of that State intended to hold, and did actually declare, that the shares of stock of a corporation having property in California were assessed and taxed in an assessment and taxation of all the property of such corporation; that all the elements of value entering into the value of the shares of such corporations should be assessed and taxed to the corporation as its franchise, and that the value of such franchise, necessarily including such elements of value, was properly ascertained by deducting from the aggregate market value of its stock, the value of the tangible property. So obviously is this true, so true is it that in no other manner could the constitutional and statutory requirements that all stock shall be assessed at its full cash value be met and satisfied, that it is the wonder of California Courts and bar that this Court should ever have doubted their holdings thereon. And when that method is adopted, it is equally obvious that no element of value can possibly escape taxation. If any element of value did so escape, the law which permitted it would be unconstitutional and void.

That *San Jose Gas Co.* vs. *January,* was intended to be an authoritative holding on the second proposition discussed in the opinion is finally established by *S. V. W. W.* vs. *Schottler,* 62 Cal., 115, where it is cited with approval upon the question and that portion of the opinion is quoted.

But the holding in *S. V. W. W.* vs. *Schottler,* 62 Cal., 69-117, affords further proof of the intention of the Spureme Court of California to affirm the method adopted in *San Jose Gas Co.* vs. *January,* for reaching the value of a franchise. On page 117 of the opinion, the Court, after reviewing the laws of California controlling her assessing officers, says:

> "It appears from the record in this case that the Board of Supervisors, in the exercise of its power of equalization, assessed the franchise of the Water Works by taking the aggregate market value of the shares of stock in the company on the 7th day of March, 1881, and deducting therefrom the value of the real and personal property of the company, and held the difference to be the value of the franchise. The market value of the stock was shown to the Board by the testimony of *witnesses.* Such a mode of arriving at the value of the franchise appears to have been adopted by the Assessor in *San Jose Gas Co.* vs. *January,* 57 Cal., 614, and this mode was held to be within the powers vested in the Assessor. It was also impliedly approved as a correct mode in *Burke* vs. *Badlam,* above cited."

Advancing a step further in the consideration of this important question, the Court passes to a review of the changes effected in the revenue law of the State in the session of the Legislature of 1881, whereby Section 3640 of the Political Code was repealed, and 3608 was added, and, after setting forth in full, it says:

> "By this section (3640), which was repealed as above, it will be seen that the whole property of the corporation, including franchise and other assessed property, would have been taxed. This was by the operation of the section to have been brought about by taxing the shares to each owner of shares in the manner indicated by its provisions. But by declaring, as was done

in section 3608, that shares of stock were not to be taxed because they possessed no intrinsic value over and above the value of the property of the corporation which they stand for and represent, and as taxing of the shares and property both would be double taxation, and therefore the shares should not be assessed, but the property should, no doubt it was their intention to tax everything in the shape of property owned by the corporation; *that everything entering into and giving value to the shares should be taxed. It cannot be doubted that the Legislature, in acting on the subject of revenue and taxation in the session of 1881, did not intend to leave the system in relation to so important a matter in such a shape, that so large an amount of property as indicated by the difference between the market value of the shares of corporations and the value of the tangible property of such corporations should escape taxation. To come to any other conclusion, would be to impute to that body a most culpable dereliction of duty.*" (The italics are ours.)

Three times, therefore, the Supreme Court of California, according to its own interpretation of its own opinions, approved this method of reaching the valuation of the franchise of a corporation.

It is impossible to believe that the Court, in the preparation of the majority opinion, gave that consideration to the cases of *Burke* vs. *Badlam, San Jose Gas Co.* vs. *January,* and *S. V. W. W.* vs. *Schottler,* cited above, which their significance required. Not only has the Supreme Court of California so interpreted the laws of California, but it has been held that "to come to any other conclusion would be to " impute to that body (the Legislature) a most cul- " pable dereliction of duty." Yet, the learned author of the majority opinion casts aside these solemn ad-

judications of the Supreme Court of California, as without relevancy to the point stated, and passes to the consideration of *Bank of California* vs. *San Francisco,* 142 Cal., 276, as the only case in that State having any bearing upon the subject, and, having stated as the principal expression of the rule the case which is but a reiteration of the holdings referred to in the three prior cases, the learned justice proceeds to a technical and, we respectfully submit, not altogether fair, review of that decision.

It is greatly to be regretted that the laws afford no method by which a misinterpreted Court may certify to the correct interpretation of its own opinion. It may be regarded as almost beyond human effort to so express the judgment of a Court as to leave it entirely free from misinterpretation. Especially is this true where the interpreting superior is without the influence of those environs and precedents which make the meaning clear to the Court rendering the opinion. Were it possible in this case to certify the view of the author and his associates on the Supreme Court of California as to what was intended to be decided in *Bank of California* vs. *San Francisco,* no doubt would be left of the fact that the majority opinion of this Court, has misinterpreted the opinion in that case, and that the correct view of the Court's intentional expression of the law of California is found in the opinion of Mr. Justice Brewer. I am satisfied it is a matter of regret, not only to the

appellee and the people of California, who have suffered this "grievous wrong," but also of the State Supreme Court. Certainly there was no intention, either expressed or implied, in the opinion in that case, of casting any doubt upon a principle of law so long established and generally observed as the principle of taxation for which we contend. From 1881, when the assessment referred to in *Burke* vs. *Badlam, San Jose Gas Co.* vs. *January,* and *S. V. W. W.* vs. *Schottler,* were made, until the assessment of 1901, twenty years thereafter, when the assessment of the Bank of California was made, no one had ever doubted that those cases required that the franchises of domestic corporations should be assessed at such a valuation as should equal the difference between the market value of the stock of such corporations and the value of their other corporate property. Instead of making a departure from the rulings of the Court in *Burke* vs. *Badlam, San Jose Gas Co.* vs. *January,* and *S. V. W. W.* vs. *Schottler,* in all of which cases that method of assessing a franchise value was approved, the Court, in *Bank of California* vs. *San Francisco,* expressly and repeatedly reaffirms and relies upon such cases. On the method of valuing a franchise, as stated in these cases, the Court says:

"The method of determining the value of the franchises there employed was declared by the Court to have been held to be within the powers of the Assessor in *San Jose Gas Co.* vs. *January,* 57 Cal., 614, and impliedly approved as a correct mode in *People ex re Burke* vs. *Badlam,* 57 Cal., 594. (See, also,

Spring Valley Water Works vs. *Burke*, 99 Cal., 36; *San Jose Gas Co.* vs. *January*, 57 Cal., 614; *London, etc. Bank* vs. *Block*, 117 Fed., 900.)"

Is it possible the Supreme Court of California designedly cast doubt upon a proposition of law, established and undisputed for twenty years, as a principle of taxation, and relied upon the cases in which such principle was confirmed for the purpose of stating such doubt? Does any member of the Court attribute to the Supreme Court of California any such unusual—extraordinary conduct? Can it be possible that the misuse of the word "if" in the language of a State Court, used in an opinion having every evidence of a contrary holding, should be so tortured and misinterpreted as to change the entire meaning of such opinion and defeat the operation of a material part of a State's system of taxation? When the Court of California said:

> "It is clear that if the laws of this State properly express the intention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property."

it was not intended that any doubt should be cast upon the question, theretofore and for twenty years set at rest in that State. It is impossible to point this out more clearly than his Honor, Mr. Justice Brewer, has done in the dissenting opinion. To hold that the isolated phrase quoted has, or was intended to have, any such effect, is to disregard the plainest

rules of construction and the positive declarations of the Court.

IV.

ASSESSOR REQUIRED TO ASSESS IN ANY EVENT.

But, irrespective of the question whether the Supreme Court of California has affirmatively declared that the assessing officers of California shall ascertain and assess the full cash value of the stock of California corporations, in the manner in which such officers did so assess in the assessments reviewed and sustained in *Burke* vs. *Badlam, San Jose Gas Co.* vs. *January, S. V. W. W.* vs. *Schottler,* and *Bank of California* vs. *San Francisco,* it should be sufficient for this Court that the statutes of California contain the requirement that stock shall be assessed at its full cash value, and that the Supreme Court of that State has never doubted that they did so require. Had the Supreme Court of California never been called up to pass upon this question, would it occur to this Court to doubt that the tax laws of California require the stock of California corporations to be taxed at their full cash value? The Constitution of the State commands the taxation of shares of stock in proportion to value, to be ascertained as provided by law. The Legislature has declared how that value shall be ascertained by defining it to be the "full cash value," the value at which it would be

taken in payment of a just debt due from a solvent debtor.

Section 3628 of the Political Code commands:

> "The Assessor must, between the first Mondays in March and July of each year, ascertain the names of all taxable inhabitants, and all property in his county subject to taxation * * * and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was, at twelve o'clock meridian of the first Monday in March next preceding."

Section 3627 of the same Code defines how the assessment shall be made by requiring "all taxable " property must be assessed at its full cash value."

Read together the sections plainly require that the Assessor must assess all shares of stock at their full cash value. No quarrel is made by the majority opinion with the fact that the California system contemplates the assessment of the value of the stock through the medium of the property of the corporation. Such a method of reaching such value is found to be sufficient for the purposes of the Act of Congress. It is further conceded that good will, or dividend-earning power may be assessed under the denomination "franchise." How, then, is there any escape from the conclusion that it is the imperative duty of the Assessor to so assess the value creating elements possessed by the corporation at such value as shall equal the aggregate cash value of its shares of stock? The method employed in *Burke* vs. *Badlam, San Jose Gas Co.* vs. *January, S. V. W. W.* vs. *Schottler,* and *Bank of California* vs. *San Francisco,*

effected such a result. Such a method was approved in those cases. But there may be other methods of reaching the same result, and, if there are, nothing prevents the Assessor from adopting them. The law gives him a discretion in fixing the value of the property of the corporation, but he is imperatively required to so place that value as to equal the cash value of the entire stock of the corporation. If he does not employ a method which will make such a result possible he has failed to assess the stock of California corporations at its full cash value, and has violated a duty which the statute plainly and unequivocally places upon him.

By the same rule of assessment is he required to assess national bank stock and none other.

"The stockholders in every national banking association doing business in this State, and having its principal place of business located in this State, shall be assessed and taxed on the *value* of their shares of stock therein; and *said shares shall be valued and assessed as is other property for taxation* * * * *And the assessment and taxation of said shares of stock in said national banking association shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State.*"

Sec. 3609, Political Code.

Precisely the same rule of assessment is prescribed, therefore, for the assessment of national bank stock as is prescribed for "other moneyed capital," which, of course, includes the shares of stock of State corporations. In both instances, they are to be assessed at

their full cash value. The duty is as imperative in one case as in the other. Absolutely no distinction is made. The duty of the Assessor having been defined by positive law, which admits of no doubtful construction, it is not a question whether the Supreme Court of the State has affirmatively declared such laws to mean what they profess to mean, but the question is has the Supreme Court of the State said that they mean anything else. The positive law of the State having placed the duty upon the Assessor of taxing the shares of stock of California corporations at their full cash value, that is sufficient without a judicial reiteration of such duty. If it were true, therefore, which it is not, that the Supreme Court of California had not passed upon the duty of the Assessor in this behalf, that would suggest no reason for holding that the substantive law of the State did not require him to so assess shares of stock. The statute is plain and requires no interpretation, but it is difficult to understand how, in the light of the cases cited, it can be said that any doubt has been cast upon the duty of the Assessor in that behalf. On the contrary, the decisions sustain and enforce the law in its fullest vigor.

The majority opinion of the Court concludes:

"From this, of course, it would follow that, if the statutes of California, either from their text or as construed by the highest court of that State, compelled the assessing officers in the valuation of the property to State banks and other moneyed corporations to include also those elements of value which are em-

braced in the assessment of shares of stock of national banks, so that there would be an equality of taxation as respects national banks, the discrimination which we find to exist under the present state of the law of California would disappear."

Accepting this statement as an authoritative explanation of the views of the majority of the Court, we confidently submit that not only the revenue laws of California require, but the Supreme Court of that State has interpreted them to require such a method of assessment of the stock of State corporations.

V.

TRIED BY THE RECORD.

The majority opinion asserts: "We decide this case solely upon the record before us."

Let us see how far the record supports the views expressed.

First—What are the grounds of discrimination set forth in the bill of complaint and placed in issue by the answer? They are:

1—That the shares of stock of California corporations will not be assessed or taxed. It is stated thus:

"That under and by virtue of the laws of the said State of California, all shares of stock in corporations organized under the laws of said State * * * and especially in corporations organized under the laws of said States for the purpose of banking, all shares of stock thereof * * * are expressly exempt from assessment and taxation, and the same are not subject thereto, and that the respondent has not assessed, and will not assess * * * and does not intend to assess, to the holders of shares in corporations organized under the laws of the said State

of California, the value of the same, or to collect from such shareholders any taxes on said shares or the value thereof." (Page 13 of Record.)

Again, against this allegation of discrimination the majority opinion finds affirmatively. It says:

"As, then, no conflict necessarily arises between the Act of Congress and the state law, solely because the latter provides one method for taxation of state banks and other moneyed corporations and another method for national banks, it follows that the contention, that the State law, for that reason, is repugnant to the Act of Congress, is without merit."

The majority opinion then proceeds to consider the conclusion that "irrespective of the face of the "State law, that law is void because of discrimina- "tion against national banks within the principles "settled in the *Davenport* case." This conclusion, the majority opinion says, was embraced in the pleadings, was expressly covered by the stipulated facts, the overruling of which was assigned as error in the Circuit Court of Appeals and in this Court, and was elaborately discussed by both parties in the argument at law. Whether such contention was embraced in the pleadings is the only test whether it was in the case. If not within the pleadings, its assignment as error would not make a failure of the lower Court to consider it error, its insertion in the stipulated facts would not make it an issue, and its discussion as a precautionary matter would not authorize its consideration. The issue set forth in the pleading was addressed to the fact that the laws of

California expressly provided that the stock of California corporations should not be taxed otherwise than through the medium of the values of such corporations. This alone was relied upon in this paragraph of the bill, and this contention was affirmatively found against appellant by this Court. Finally the Circuit Court of Appeals did not consider this contention within the issues of the case, and did not pass upon it in *Nevada National Bank* vs. *Dodge,* the pleadings in which are the same as in the case at bar. The numerous counsel for appellant did not state it as an issue in their statement of their contentions, as set forth on pages 8 and 9 of "Brief for Appellant," and quoted in the minority opinion.

2—That a discrimination will result, against the shares of stock of national banks, from the fact that no deduction will be allowed to the holders of such stock on account of debts due from such holders to bona fide residents of California, whereas such deductions are permitted to the holders of other moneyed capital in the shape of solvent credits.

This conclusion was held by the majority opinion to be "without merit" on the authority of *Nevada National Bank* vs. *Dodge,* 119 Fed. Rep., 57.

3—That Sections 3608 and 3609 of the Political Code permit the deduction from the value of the shares of national banks of the value of all property exempt by law from taxation, and that, inasmuch as all property of national banks, except real estate,

is exempt by federal statute, and the value of such real estate is also required to be deducted, nothing remains to be taxed as the value of such shares.

This contention is also found to be "without merit." and the judgment of the Circuit Court of Appeals affirmed on this point on the authority of the same case.

VI.

NO EVIDENCE OF DISCRIMINATION.

Nor was there any evidence supporting the issue of discrimination assumed by the majority opinion to exist and made the sole basis of the reversal.

It appears from the agreed statement that the assessment complained of was made in the following manner:

> "The defendant, in making his assessment, fixed the value of the shares for taxation at $104.35 each, and arrived at that valuation in the following manner: He added to the capital stock of the bank, $500,000, its undivided profits amounting to $77,260, deducting the face value of United States bonds held by it, $50,000, and the value of its franchise, $5,500, leaving $521,760 as the total assessable value, and dividing that by the number of shares made the assessable value of each share the sum above cited."

The assessment of appellant was made, therefore, upon the actual tangible property of the bank. Nothing that existed in the imagination; nothing that was not present to the senses; nothing that was not demonstrated to exist by the books of the corporation itself, was assessed. The franchise value—the

value of its good will, its dividend-earning power, of these elements which go to form a part of the value of its stock—and are assessed to California corporations as franchises—was omitted in the assessment of the stock of the San Francisco National Bank.

If considered, they would have increased the value of the stock of the corporation and the tax thereon would have been increased. But all questions as to the propriety of assessing such elements was avoided by omitting to tax them. Certainly the bank could not complain of this. But, says the majority opinion, the national bank, although not itself assessed for such elements of value, may complain because some State corporation is not assessed therefor. This proposition is nothing short of extraordinary. The mere statements of it provokes surprise and doubt. Suppose every national bank in California had been assessed, as we assume from this record was the case, at the book value of the stock. Suppose that every California corporation had been assessed upon the same basis. Is it possible that there would have resulted any discrimination against national banks? Manifestly not. Suppose that every California corporation had been assessed on the book value of its stock plus a franchise value. Would there then appear any discrimination against national banking stock? Manifestly not. The Act of Congress does not require that shares of stock of California corporations shall be assessed at a

greater value than the shares of stock of national banks. If a national bank is assessed less than a State corporation, owing to the fact that certain properties in State corporations are assessed to it and not to the national bank, does it follow that the Act of Congress has been violated? Suppose the law of California did not permit the assessment of the shares of stock of a national bank at more than their book value, but required that the shares of stock of a California corporation should be assessed at their book value plus a franchise value. Could the national bank stockholder complain? And yet the majority of this Court, in deciding this case upon the record before it, from which it appears that the stock of the San Francisco National Bank was assessed at its actual book value, and the stock of the State banks was assessed in excess of its book value, has solemnly determined that the stockholder in the National Bank has been discriminated against.

This is certainly a most radical departure from the rule heretofore acted upon in this Court. In *Supervisors* vs. *Stanley,* 105 U. S., 305-311, this Court was called upon to consider the validity of a law of New York providing for the assessment of national bank stock. The law was attacked upon the ground that it did "not permit a stockholder of a "national bank to deduct the amount of his just "debts from the assessed value of his stock, while by "the laws of the State the owner of all other per-

" sonal taxable property can deduct such debts from " its value." As so interpreted by the Court of Appeals of New York, such deduction was not permitted and this Court held the law invalid so far as it affected those having debts to deduct. But, says the Court:

> "What is there to render it void as to a shareholder in a national bank, who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction."

And so in the case at bar, can appellant be heard to complain because the State bank was not assessed for a particular kind of property for which it was not itself assessed? If the law of California had provided for the assessment to California corporations of the value of their furniture, and had exempted the furniture of national banks from taxation, could the national bank complain? And so in the case at bar, when there is assessed to the California bank $750,000 for a franchise and nothing at all is assessed to the national bank as a franchise value, we are surprised to find this Court holding that the national bank has been the object of a discrimination.

The learned author of the majority opinion says this contention is reducible to this:

> "That, when property of one person worth a given amount

is assessed for its full value, no discrimination in favor of another results when the latter is assessed for a sum greatly below the value of the property assessed."

We are told that our law is void because we do not include good-will as an element in the valuation of the shares of our corporations. We answer that if that were true the appellant is not concerned because we did not include that element as an element in valuing its stock. If appellant's contention were sound we would not be discriminating against appellant, and there is not a syllable of evidence that we have assessed it for any good-will. Far from the statement in the stipulated facts that the Bank of California was assessed for $750,000 on franchise instead of $3,000,000 assisting appellant, it is a demonstration that that State bank was assessed upon properties which were not assessed to appellant, though undoubtedly owned by it.

But the evidence, on pages 84 and 85 of the Record, does show a statement of the financial condition of the Commercial banks of California, on the 31st day of March, 1900, as reported to the Bank Commissioners of that State.

An analysis of it, with particular reference to the market value of the stock of such corporations, which is placed at $30,000,000 on page 81 of the Record, will demonstrate that the assessment of the taxable property of State banks, in accordance with California's tax system, will impose a greater tax in

an assessment levied on the stock directly, than would be imposed upon national banks having the same assets and liabilities. And this will be found to be true, in the absence of any franchise tax whatever.

Numbering the items, shown by the tabular statement, from left to right, and classifying them according to the necessities of the tax system, we find the following:

Line			
	ASSESSED AS STATE BANKS.		
1	Bank Premises	$ 3,424,614.33	
2	Other Real Estate	8,431,854.16	
4	Loans on Real Estate	19,337,586.89	
	Total Assessed on Real Estate		$31,194,055.38
	Assessed as Personal Property.		
3	Invested in Bonds, Stock	9,962,381.22	
8	Money on Hand	14,681,976.13	
10	Other Assets	2,370,585.28	
	Total Assessed as Personal Property		27,014,942.63
	Solvent Credits.		
5	Loans on Stocks B. & W.	14,741,763.67	
6	Loans on other Securities	4,977,526.69	
7	Loans on Personal Security	40,010,187.53	
8	Due from Banks & Bankers	24,315,194.52	
	Total Sol. Credits	$84,044,672.41	
	Less Debts.		
16	Due for City & Co. Money	212,373.78	
14	Due Depositors, Resident	84,197,990.80	
15	Due Banks and Bankers	8,617,452.31	
	Total Debts	$93,027,816.89	
	Balance Assessable		—o—
	Total Assessment		$58,208,998.01

Value of the Shares of Stock.

12	Capital paid in on 263,407 shares	26,340,790.12	
13	Reserve, and Profit and Loss	18,842,100.46	
	Total Value of all the Shares		45,182,890.58
	Assessment in excess of Book Value of all the Shares		13,026,107.43

ASSESSED AS NATIONAL BANKS.

The Assessment would be on Real Estate		31,194,055.38
To the Individual Stockholders on their Shares. (A decrease when assessed as a National Bank of $13,026,107.43 over assessment of a State Bank with same capital and same assets.)		13,988,835.20
Total		$45,182,890.58

BOOK VALUE OF STOCK IN STATE BANKS.

As per Line.			
12	Capital Stock paid in on 263,407 shares	26,340,790.12	
13	Reserve Fund and profit and loss	18,842,100.46	
14	Total Book Value of all the shares		45,182,890.58
	or divided by 263,407 shares equals 171.53 a share.		

Which may be said to be invested as follows:

1	Bank Premises	3,424,614.33	
2	Other Real Estate	8,431,854.16	
3	Invested in Bonds, Stocks and Warrants	9,962,381.22	
4	Loans on Real Estate	19,337,586.89	
10	Other Assets	2,370,585.28	
Part of Line 8	Balance of Capital paid in held as money on hand	1,655,868.70	
	Total Investment of all the Capital Stock		45,182,890.58

Explanation: The State Banks have total Money on hand, $14,681,976.13, of which $1,655,868.70 is a part of the Capital Stock paid in, and $13,026,-107.43 is a part of the money due depositors. As the Constitution of California, Art. XIII, sec. 1, and Political Code, sec. 3617, paragraph 6, does *not* include *"money on hand"* as a *credit* from which *debts* (amount due depositors) can be deducted, a State bank assessed on its *assets* is obliged to pay on money on hand, whereas a National Bank assessed on the *value* of its *shares* and *not* on its *assets* receives that much lower assessment by virtue of being a National Bank. To illustrate:

A State Bank, paid-up Capital..... $100,000
Has Due Depositors 1,000,000
It keeps a Cash reserve of 50 per cent or
Money on hand 500,000
for which it is assessed—hence it is paying on 5 times its capital.

From this it appears that a national bank possessing the same properties would be assessed, under the State system, $45,152,890.58, including real estate.

That a State bank would be assessed for the same properties, $58,208,898.01, including real estate.

It is the agreed fact that these commercial banks "are assessed and pay taxes in the manner and form "prescribed by the laws of the State of California"

and that "the said banks and said property were so "assessed and taxed for the fiscal year ending June "30, 1901, and the franchises of said commercial "banks and trust companies were also assessed to "said trust companies" (Record, pp. 78-80).

It is further agreed that the aggregate value of the shares of stock of such banks and trust companies on the first Monday in March, amounted to the sum of $30,000,000 (Record, p. 81).

According to the record showing in this case, therefore, the commercial banks and trust companies of California, when assessed according to the laws of that State, and without any franchise value whatsoever, would be taxed nearly double the market value of their stock. This should satisfy the most exacting interpretation of the requirements of Congress.

VII.

DISCRIMINATION BY ASSESSING OFFICERS.

But, if we assume that there has been a discrimination against the holders of national bank stock, such discrimination has resulted, not from anything in the law of California requiring it, but from disobedience of such law by the assessing officers in administrating such laws. It is conceded by the majority opinion that there is nothing on the face of the tax laws of California requiring a discrimination. The burden of discrimination is placed upon

the assertion that the assessing officers, in assessing the value of the stock of California corporations, do not employ a method of valuation in valuing the property of such corporation that will bring such value up to the market value of the stock. There is nothing in the record indicating such to be the fact, but if there were, the effect would be to make the assessment complained of void. It would not follow, however, that the Act under which it was erroneously made, is unconstitutional. It cannot be said that the law may depend for its constitutionality upon the manner in which it is administered when such administration is contrary to the requirements of such law. It is the express mandate of the California law (Sec. 3609, Pol. Code) that the shares of stock of national banks shall be "assessed "as is other property for taxation," "and the assess- "ment and taxation of such shares of stock in such "national banking associations shall not be at a "greater rate than is made or assessed upon other "moneyed capital in the hands of individual citi- "zens of this State." Other moneyed capital, including shares of stock, is required by the Constitution and laws of the State, to be assessed and taxed at its full cash value. (Sec. 1, Art. XIII, Constitution of California; Sec. 3617, Political Code.) If the assessing officers did not heed the duty so imperatively placed upon them, and assess the stock

of California corporations for the year 1900-01, does it follow that they have rendered a law, otherwise constitutional, unconstitutional? It can scarcely be considered the law, that a statute may be constitutional when obeyed and unconstitutional when disobeyed. Yet such is the holding of the majority opinion of this Court, for, the law being constitutional on its face, is held unconstitutional on the unsupported assumption that the assessing officers have not given it full operation. Should another case be prosecuted, under the same law, in which it shall be made to appear that the assessing officers have included in the valuation of the property of all California corporations the elements of value which the majority opinion finds were omitted this year, would the law then return to its constitutional perfection? To state the proposition is to demonstrate that it is unsound. The constitutionality of a law cannot be made to depend upon the action of an executive officer who interprets it in such a manner as to give it an unconstitutional operation. Accepting all that is said in the majority opinion as true, it does not follow that the law is unconstitutional. The most that can be said is that the assessment is void because made in disregard thereof.

No more forcible way of closing this portion of this petition suggests itself than to quote the conclusion arrived at by the minority of the Court and set

forth with such convincing clearness by Mr. Justice Brewer:

"Summing the matter up, the Constitution declares that 'all property * * * shall be taxed in proportion to its value,' and defines 'property' as including 'franchises, and all other matters and things, real, personal, and mixed, capable of private ownership.' Franchises, dividend-earning, profit-earning power, are capable of private ownership. Indeed, the opinion of the Court is based on the contention that they are assessed to the holder of shares in national banks, and not assessed upon the State banks. Section 3608 provides that 'all property belonging to corporations (save and except the property of national banking associations, not assessable by Federal statute) shall be assessed and taxed.' Section 3609, that the shares in national banking associations 'shall be valued and assessed as is other property for taxation.' The Supreme Court of the State holds that a stockholder in a State bank 'could not be assessed upon his certificate of stock, inasmuch as his shares were simply an interest in the very property held by the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate.' (142 Cal., 282, 64 L. R. A., 920; 100 Am. St. Rep., 135; 75 Pac., 835.) There is neither allegation nor evidence that there was any over-valuation of the plaintiff's shares of stock. The complaint is that there was a discrimination by reason of the failure to deduct from the value of the shares the entire value of the bank's tangible property, because 'used and employed by it in the conduct and carrying on its business as a national banking association.' And yet, in the face of the plain words of the Constitution and statutes, the clear language of the Supreme Court of California, and the absence of allegation or proof of actual discrimination, this Court, by its opinion, strikes down the whole system of California for the taxation of shares of national banks."

VIII.

THE REMEDY.

It is impossible to improve upon the learned and convincing review by Mr. Justice Brewer, and his associates, of the authorities in this Court denying relief by injunction in proceedings where interference is sought with the revenues of a State on the ground alone of the illegality of the tax complained of. The views therein expressed so faithfully reflect the equitable rules in that behalf as to lead to the conviction that, whatever may be the final issue of this cause, the position taken by the majority of the Court must be changed ultimately to conform to the views of the minority.

A further analysis of the tax laws of California discloses a further reason for denying relief in equity. As an integral part of the tax system of California there is established by the Constitution (Ses. 9, Article XIII), and the statutes, (Secs. 3672 *et seq.*, of the Political Code), State and County Boards of Equalization, which boards are charged by law with the equalization of assessments made, in the first instance, by the local assessors.

The county board to which the appellant might have applied for relief against an excessive or a void assessment, is empowered by Section 3673 of the Political Code: "After giving notice in such manner as "it may by rule prescribe, to increase or lower the

"entire assessment roll or any assessment contained "therein, so as to equalize the assessment of the "property contained in said roll, and make the as- "sessment to conform to the value of such property "in money."

And the Supreme Court of California, in considering the powers of the Assessor and the County Board of Equalization to correct and afford relief from excessive or void assessments, in *Henne* vs. *Los Angeles County*, 129 Cal., 299, said:

> "For an over-valuation of the assessment of property belonging to a taxpayer, a remedy is furnished him by statute, as already shown, first by an application to the assessor at any time before it passes out of his hand to the Board of Supervisors, and thereafter to the Board of Supervisors until the assessments have been equalized and the matter has gone beyond their control. As was said in *Osborn* vs. *Danvers*, 6 Pick., 98: 'But great mischief would follow if we were to hold that an excess of valuation would render an assessment illegal and void. And it is immaterial whether the excess is caused by including in the valuation property of which the person taxed is not the owner, or that for which he is not liable to be taxed. In both cases the remedy is the same. * * * His only remedy is application for abatement. For when a new right is created by statute, which at the same time provides a remedy for any infringement of it, that remedy must be pursued.' It was the fault of the plaintiff in this case that he did not obtain relief by one or the other of the modes indicated, inasmuch as his application was too late in both cases."

Here, then, we find the law of California, as interpreted by her own Courts, affording a plain, speedy and adequate remedy, not only for an over-valuation of property confessedly taxable, but for

relief from a valuation of property "for which he is not liable to be taxed." No pretense was made by appellant of availing itself of these remedies, either by application to the assessor or to the proper board of equalization. Indeed, the injunctive process of the Federal Courts was invoked before the State and its assessing officers had completed the assessment and determined finally the amount for which its stockholders would be assessed.

This is assigned as an additional reason why the judgment of the Circuit Courts should be affirmed.

IN CONCLUSION.

In finally submitting this petition we suggest, in apology for the labor which its length will entail upon this Court in its consideration, that the questions involved are of the first importance to the integrity of the tax system of California. This is a case, which, unexpectedly broadening in its scope, must result, if permitted to remain as now decided, not only in the exemption of national bank stock from taxation—to the manifest disadvantage and injury of our State banking corporations,—but, in the doubt which is cast by the majority opinion upon established and long recognized rule in California for assessing and taxing the shares of stock of such corporations,—will distort and unsettle doctrines of purely local and State concern, upon which action has been confidently taken for twenty years. That

the State of California, either in statute or decision, has ever manifested any hostility to the national banking associations doing business within her borders is not and cannot be truthfully asserted. The decisions of her Courts have gone beyond the full measure of protection afforded by the Federal Statute (*Miller* vs. *Heilbron,* 57 Cal.) in support of the rights of such associations. This is the first time, in a statehood of fifty years, that any statute has ever been passed, addressed directly to the subject of State taxation of national bank stock, and so fair is that statute, both by its term and its operation, as to justify and sustain the view expressed by Mr. Justice Brewer, in which we are satisfied the entire Court concurs, that, "whatever may be the effect of "the statute in creating or opening the door to dis- "crimination, no one can read it and say that there "was intent to discriminate injuriously against "national banks. The statute is positive in its lan- "guage that national bank shares shall be assessed "and taxed as is other property, and there was be- "yond doubt an attempt on the part of the Cali- "fornia Legislature to cast only an equal burden of "taxation on such shares."

With equal fairness has the Supreme Court of the State addressed itself to the same subject (*Miller* vs. *Heilbron,* 57 Cal., 133; *McHenry* vs. *Donner,* 116 Cal., 20; *First National Bank* vs. *San Francisco,* 129 Cal., 96).

It was, therefore, and still is, with the entire confidence in the justice of her cause, that the State of California has submitted and does now submit to the final determination of this highest of all earthly Courts, the issues involved in this litigation. It is confidently expected that there will be addressed to the solution of those supreme issues the high abilities possessed by the members of this Court, and that the subject being considered will be approached and disposed of in that high-minded and liberal spirit which their dignity commands. With that exalted respect and pride which the bar of this nation feels for this supreme tribunal, it is submitted that the majority opinion of this Court does not evince that liberality of construction which we are justified in expecting in that large class of cases involving the taxing power of the States. The interpretation placed upon the decisions of California and especially upon the decision in *Bank of California* vs. *San Francisco,* 142 Cal., disregards the express holdings of that Court, and, placing the burden of the conclusion upon the use of the word "if" in the sentence, "It is clear that, if the laws of the State " properly express the intention that everything that " gives value to the shares of a corporation shall be " assessed as property of the corporation, the true " value of those shares is a most important element " in determining the value of such property," invokes the retort from the minority of the Court:

" Certainly it seems to me there is no justification in " torturing this word 'if' as overthrowing all the " clear declarations of the Court, as well as imply- " ing a destruction of the plain letter of the statute." When a denial is made not only of the power to tax national bank stock, but of the established and settled doctrine of a State for the taxation of its own corporations, it is but reasonable to expect that more substantial grounds will be found therefor. If there is to be found any doubtful passages in the laws or decisions of a State, such doubts should be resolved in favor of the taxing power. Especially when it is honestly doubted that any doubt exists, and no want of fairness is shown in the valuation or levy of the tax.

"Believing that a grievous wrong is done the State of California," and not desiring to "impute to this "Court an intention to favor national bank prop- " erty in the matter of taxation, and to lay down a " rule for its benefit which is denied to all other " property," we respectfully submit an opportunity should be afforded for a further consideration of this cause.

PERCY V. LONG,
City Attorney,
Solicitor for Appellee.

W. I. BROBECK,
Assistant City Attorney,
Of Counsel for Appellee.

OPINIONS RENDERED ON FORMER HEARING.

For convenient reference there is printed herewith the opinions of Mr. Justice White and Mr. Justice Brewer, authors, respectively, of the majority and minority opinions in this case:

SAN FRANCISCO NATIONAL BANK,
Appt.,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco.

State taxation of national bank stock—discrimination.

1. The adoption of a different method for taxing state banks and other moneyed corporations from that adopted for the taxation of national banks does not necessarily conflict with U. S. Rev. Stat. § 5219 (U. S. Comp. Stat. 1901, p. 3502), authorizing state taxation of shares of stock in national banks, but exacting that the tax, when levied, shall be at no greater rate than that imposed on other moneyed corporations.
2. A discrimination against national banks, and in favor of state banks and other moneyed corporations, forbidden by U. S. Rev. Stat. § 5219 (U. S. Comp. Stat. 1901, p. 3502), results from the taxation of shares of stock of national banks, under Cal. Pol. Code, §§ 3608-3610, at their market value, while the construction given by the highest state court to the provisions for the taxation of the "property" of state banks and other moneyed corporations does not require, although property is defined by Cal. Const., art. 13, § 1, as including "franchises," that the assessing officers shall include in the assessment all the intangible elements of value which form part of the market and selling value of shares of stock.

[No. 44.]

Argued November 7, 1904. Decided February 27, 1905.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of California, dismissing a suit to restrain the enforcement of taxes on shares of stock of a national bank. Decrees of both courts below *reversed* and the cause remanded to the Circuit Court for further proceedings.

The facts are stated in the opinion.

Messrs. WILLIAM S. WOOD, E. S. PILLSBURY, ALFRED SUTRO, and LLOYD & WOOD for appellant.

Messrs. WILLIAM IRVIN BROBECK and PERCY V. LONG for appellee.

Mr. Justice WHITE delivered the opinion of the court:

The appellant bank sued to restrain the enforcement of state, county, and city taxes, levied for the year 1900, upon shares of stock of the bank. Adequate averments were made to show equitable jurisdiction. *Cummings* v. *Merchants' Nat. Bank*, 101 U. S. 153, 157, 25 L. ed. 903, 904; *Hills* v. *National Albany Exch. Bank*, 105 U. S. 319, 26 L. ed. 1052; *Lander* v. *Mercantile Nat. Bank*, 186 U. S. 458, 46 L. ed. 1247, 22 Sup. Ct. Rep. 908. The taxes were alleged to be in conflict with the law of the United States. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502.

The case was submitted upon the pleadings and an agreed statement of facts. A decree of dismissal was affirmed by the circuit courts of appeals for the ninth circuit. That court deemed that the cause was controlled by the reasoning of an opinion delivered in deciding a previous case *(Nevada Nat. Bank* v. *Dodge)*, the opinion in which case is reported in 50 C. C. A. 145, 119 Fed. 57.

Before considering the connections relied on we quote the text of the Constitution of California directly relating to the subject in hand, and briefly advert to the legislation of that state which preceded the act under which the assailed tax was levied.

Section 1 of article 13 of the Constitution of California provides:

"All property in the state, not exempt under the laws of the

United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership. . . . The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits of debts due to bona fide residents of this state."

Carrying out the command to provide for the ascertainment of the value of property to be taxed, it was enacted (Pol. Code, § 3627) that all taxable property shall be assessed "at its full cash value," and (Pol. Code, § 3617) that "the terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt from a solvent debtor."

Prior to 1881 shares of stock of all corporations were taxed, and § 3640 of the Political Code commanded that the market value of the stock of a corporation should be taken as the value of the shares for assessment. Where the shares of stock were taxed no tax was levied upon the corporate property. This was because the supreme court of California had decided that to tax both the stock and the corporate property would be double taxation. *Burke* v. *Badlam,* 57 Cal. 594.

In the year 1881 the general system of taxing shares of stock was abandoned, and a rule was put in force taxing the corporate property. Section 3608 of the Political Code, which embodied this change, was as follows:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation, which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore, all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock; nor shall any holder thereof be taxed therefor."

The act of 1899, under which the tax in this case was levied, amended the section just quoted, by providing that all property belonging to corporations shall be assessed and taxed, "save and except the property of national banking associations, not assessable by Federal statute;" and by adding to the provision commanding

that no assessment shall be made of shares of stock in any corporation the following words: "Save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute." To carry out the change made by the provision just referred to two sections were added to the Political Code, *viz.*, 3609 and 3610. Section 3608, as amended by the act of 1899, and the two new sections resulting from that act, are in the margin.†

The first contention is that the law of 1899 is on its face in conflict with § 5219 of the Revised Statutes, because it taxes shares of stock in national banks, and does not tax such shares in state banks and other state moneyed corporations. As it is patent that the state banks and corporations are taxed on their property, the proposition reduces itself to this: That the states may not pursue the method permitted by the act of Congress of taking shares of stock in national banks, unless the same method is employed as to the stock of state banks and other state moneyed corporations.

In *Davenport Nat. Bank* v. *Board of Equalization*, 123 U. S.

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†3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also the corporate property, would be double taxation. Therefore, all property belonging to corporations (save and except the property of national banking associations, not assessable by Federal statute) shall be assessed and taxed. But no assessment shall be made of shares and stocks in any corporation (save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute).

3609. The stockholders in every national banking association doing business in this state, and having its principal place of business located in this state, shall be assessed and taxed on the value of their shares of stock therein; and said shares shall be valued and assessed as is other property for taxation, and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town, and county where such national banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town, or county, or not; but in the assessment of such shares each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent cred-

83, 31 L. ed. 94, 8 Sup. Ct. Rep. 73, it was decided that the provision of § 5219 of the Revised Statutes [U. S. Comp. Stat. 1901, p. 3502], authorizing the taxation of shares of stock in national banks, but exacting that the tax when levied should be at no greater rate than that imposed on other moneyed capital, did not require the states, in taxing their own corporations, "to conform to the system of taxing national banks upon the shares of their stock in the hands of their owners."

True it is in the *Davenport Case* it was also decided that the prohibition in the act of Congress of a higher rate of taxation of shares of stock in national banks than on other moneyed capital operated to avoid any method of assessment or taxation, the usual or probable effect of which would be to discriminate in favor of state banks and against national banks. True, also, is it that in the same case it was held that, even where no such discrimination

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its, in the same manner as such deductions are allowed by the provisions of paragraph 6 of § 3629 of the Political Code of the state of California. In making such assessment to each stockholder there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state.

3610. The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholder of such assessment shall be necessary for the purpose of this act. And, in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien, prior to all other liens, on his said stock, and the dividends and earnings thereof, for the reimbursement to it of such taxes so paid.

seemingly arose on the face of the statute, nevertheless, if from the record it appeared that the system created by the state in its pratcical execution produced an actual and material discrimination against national banks, it would be the duty of the court to hold the state statute to be in conflict with the act of Congress, and therefore void.

As, then, no conflict necessarily arises between the act of Congress and the state law, solely because the latter provides one method for taxation of state banks and other moneyed corporations and another method for national banks, it follows that the contention, that the state law, for that reason, is repugnant to the act of Congress, is without merit. And this brings us to consider the contention of the appellant, which we think was embraced in the pleadings, which was expressly covered by the stipulated facts, the overruling of which was assigned as error in the circuit court of appeals and by this court, and was elaborately discussed by both parties in the argument at bar, *viz.*, that, irrespective of the face of the state law, that law is void because of a discrimination against national banks, within the principles settled in the *Davenport Case.*

To determine this latter contention requires an analysis of the two systems which the law of California enforces, in order that the two may be accurately compared.

Under the law the shares of national banks must be valued at their "full cash value," which the statute defines to mean the amount at which they "would be taken for a just debt due from a solvent debtor." These words are but synonymous with the requirement that, in assessing shares of stock, their market value must be the criterion. This is the case, for, eliminating exceptional and extraordinary conditions, giving an abnormal value for the moment to stock, it is apparent that the general market value of stock is its true cash and selling value. That such is the meaning of the words in the legislation of California is indisputable, in view of the provision of § 3640 of the Political Code, which made market value the rule for assessing shares of stock during the period when the taxation of shares of stock generally prevailed, and that such requirement was mandatory was in effect held by

the supreme court of California. *Miller* v. *Heilbron,* 58 Cal. 133, 138.

What, then, was embraced in the assessment of the shares of stock at their full cash or selling or market value? It embraced, not only the book value of all the assets of the corporations, but the good will, the dividend-earning power, the ability with which the corporate affairs were managed, the confidence reposed in the capacity and permanency of tenure of the officers, and all those other indirect and intangible increments of value which enter into the estimate of the worth of stock, and help to fix the market value or selling price of the shares. Considering this subject in *Adams Exp. Co.* v. *Ohio State Auditor,* 166 U. S. 211, 41 L. ed. 974, 17 Sup. Ct. Rep. 604, the court said:

"The capital stock of a corporation, and the shares of a joint-stock association, represent, not only tangible property, but also the intangible, including therein all corporate franchises, and all contracts, privileges, and good will of the concern."

And in *Pullman's Palace Car Co.* v. *Central Transp. Co.,* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808, this was reiterated. The court, after observing that, while the franchise was one of the things entering into the computation of market value of shares of stock, said (p. 154, L. ed. p. 115, Sup. Ct. Rep. p. 815):

"The probable prospective capacity for earnings also enters largely into market value, and future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares in the market, yet do not in fact increase the value of the actual property itself. They are matters of opinion upon which persons selling and buying the stock may have different views."

That this doctrine is the rule in California is clearly shown by *Bank of California* v. *San Francisco,* 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832, for in that case the court, speaking of such elements of value as "dividend or profit earning power, or good will," said (p. 289, L. R. A. p. 924, Am. St. Rep. p. 141, Pac. p. 838):

"In this connection, it will be observed that these elements, so

far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders."

The state banks and other corporations are assessed on their property. Conceding that every species of property is assessed which is specifically enumerated as taxable in the state Constitution, it does not follow that the assessment of property as such includes good will, dividend earning power, confidence in the ability of the management, and all those other intangible elements which necessarily enter into the cash or selling value of shares of stock. As said in the passage already quoted from the *Pullman Case,* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808, such elements "may enhance the value of the shares [of stock] in the market, yet [they] do not in fact increase the value of the actual property itself. They are matters of opinion upon which persons selling and buying the stock may have different views." In the argument at bar no law of the state was referred to requiring that the assessing officers, in valuing the property of a corporation, should assess as property its good will, its dividend earning power, the confidence reposed in its officers, etc. From this analysis it results that in the one case, that of national banks, not only the value of all the tangible property, but also the value of all the intangible elements above referred to, is assessed and taxed, whilst in the other case, that of state banks and other moneyed corporations, their property is taxed, but the intangible elements of value which we have indicated are not assessed and taxed; the consequence being to give rise to the discrimination against national banks and in favor of state banks and other moneyed corporations forbidden by the act of Congress.

In the argument at bar this conclusion, it is insisted, is avoided, because, whilst under the text of the state statutes it may be that all the elements of value which are included in the assessment of shares of stock are not *eo nomine* assessed against state banks and other moneyed corporations as property, they are, nevertheless, assessed against such corporations under the denomination of "franchise," the duty of the assessing officer to do so being imperative, as the result of the interpretation given to the taxing law by the supreme court of the state. The proposition is thus stated in the argument of counsel:

"Under the California system, all the property of California corporations is assessed, including their franchises. It is frequently the case that the market value of the stock of the corporation is greatly in excess of the value of its property, other than its franchise. This fact was called to the attention of the state court, which recognized the force of this suggestion, and held, the Constitution and laws of the state require the assessment and taxation of the franchise of the corporation, and that its value, for the purpose of such assessment and taxation, was properly ascertained by deducting from the market value of its stock the value of its corporate property and assessing the remainder as franchise."

It may be conceded that, if the statutes have been interpreted by the supreme court of the state as thus asserted, and that, as so interpreted, they have been applied by the assessing officers, there would be an end to the discrimination which we have seen arises from the consideration of the result of the statutes when not so interpreted.

The question then is, do the decisions of the supreme court of California, as contended, place the positive duty on the assessor of including in an assessment of the franchises of state corporations all the elements of value which form part of the market or selling value of shares of stock?

Three cases are cited to sustain the proposition, *viz.*, *San Jose Gas Co.* v. *January*, 57 Cal. 614; *Spring Valley Waterworks* v. *Schottler*, 62 Cal. 69; and *Bank of California* v. *San Francisco*, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832.

Before coming to consider the last case cited, which is the one principally relied upon, we dispose of the two others by saying that they do not support the proposition. The first simply decided that where a part of a tax was asserted to be illegal, and a part was admitted to be valid, the duty existed to pay the confessedly legal part to justify relief concerning the portion claimed to be illegal. The second case but decided that the franchises of corporations were taxable as property, and, where a corporation enjoyed other franchises than the right to exist as a corporation, and the board of equalization, in assessing such franchises, had treated them as equivalent in value to the selling value of the capital stock, the courts had no power to interfere with the discretion lodged

in the assessing officers. In the last-cited and latest-decided case, *Bank of California* v. *San Francisco,* the controversy was this: The Bank of California was assessed on its property. The difference between the value of such property and the cash or selling or market value of the shares of stock of the corporation was $2,943,-096.92. The franchise, instead of being assessed for this amount, was valued only at $750,000. This valuation was resisted by the bank, upon the ground that it was so large that it must have included good will, dividend-earning capacity, etc., which, it was asserted, could not under the law be embraced in an assessment of franchises. The court elaborately reasoned (there being two dissenting judges) that, in view of the power of the assessors to value property, it "could not say" that the assessing officers had transcended their authority in making the valuation complained of. Speaking of the duty of the assessing officers, it was said (p. 288, L. R. A. p. 923, Am. St. Rep. p. 141, Pac. p. 837):

"'The duty of making the valuation was cast upon the assessor. The method of arriving at the valuation, the process by which his mind reached the conclusion [in cases where, as here, it is not pretended that he acted fraudulently or dishonestly], is matter committed to his determination.' . . . This appears to be determinative of the contention here made. . . . (p. 289, L. R. A. p. 924, Am. St. Rep. p. 141, Pac. p. 838.) Whether or not the whole difference between the aggregate market value of the shares of stock and the value of the tangible property,—*viz.*, $2,943,-096.92,—was the value of the franchise, the assessor certainly had the right to take the value of the shares into consideration in determining the value of the franchise; and, were we at liberty to review the judgment of the assessor and of the board of equalization upon those matters, we could not say that an assessment of $750,000 thereon is unjust, or that it includes such elements as dividend or profit-earning power, or good will, which, it is claimed, should not be taken into consideration in determining the value of the property of the corporation."

After pointing out that these elements entered into the assessment of shares of stock at their market value, it was observed (p. 289, L. R. A. p. 924, Am. St. Rep. p. 741, Pac. p. 838):

"It is clear that, if the laws of the state properly express the in-

tention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property."

In other words, the court simply declared that *if* the law of the state properly expressed the purpose to tax everything of value, the assessor had a discretion to consider what was the selling value of shares of stock in fixing the value of the franchise. Instead of supporting the contention that the law obliged the assessor to attribute to the franchise the value of those intangible elements which it was conceded were embraced in the assessment of shares of stock, the reasoning of the opinion is to the contrary. As the cash, selling, or market value of the stock in the case before the court was conceded to have been nearly $3,000,000 greater than the tangible property assessed to the corporation, and the assessor had valued the franchise, not at that sum, but at only $750,000, it is patent that, if the law of California had been what it is now asserted the court held it to be, that the claim that there was an overvaluation of the franchise would have been so frivolous as to require only a statement of the law to decide against the claim of overvaluation.

But the court made no such statement. On the contrary, it stated its inability to judicially declare that an assessment was extravagant and grossly unjust which was more than $2,000,000 lower than it should have been if the law imposed the obligation on the assessor of valuing the franchise by the difference between the value of the tangible property assessed and the cash or selling value of the shares of stock. This inability to give relief was placed solely upon the discretion which the law lodged in the assessor. But this interpretation of the statute serves only to further demonstrate the discrimination which has been previously pointed out. This result is made clear by comparing the discretion lodged in the assessor in valuing the franchise of state banks or other moneyed corporations with the duty resting on him as to the valuation of shares of national banks. The wide difference between the *discretion* on the one hand and the *duty* on the other will be additionally demonstrated by a consideration of the dis-

crimination against national banks which has arisen in the practical execution of the statutes.

In the agreed statement of facts it was admitted that there are *in the state of California* 178 commercial (or state) banks, possessing a vast amount of capital, 18 of which were located in San Francisco. And, to quote from the statement, "that the manner in which franchises of commercial banks and trust companies were assessed for said fiscal year ending June 30, 1901, by the assessor of the city and county of San Francisco, is illustrated by the case of the Bank of California, a banking corporation organized under the laws of the state of California." The assessment in question, which it is thus declared in the statement of facts is illustrative of the other assessments against state banks, was the one which was involved in the controversy decided in the *Bank of California Case, supra.* It is then recited in the agreed statement that the total property resources of the Bank of California, correcting a misprint in the record, were $5,156,903.08; and that the market or selling value of its capital stock was $8,100,000, a difference of $2,943,096.92; and that, deducting from the resources of the bank certain exemptions, the bank was assessed for property at $2,311,774. To this last-mentioned sum was added for franchise tax, not the difference between the value of the property and the selling value of the stock, which, as stated, was nearly $3,000,000, but only $750,000. It is insisted in argument that this statement shows but a single case of undervaluation of a state bank by the assessors, and therefore does not justify the conclusion that, in the exercise of their discretion, the assessors had generally, as to state banks and corporations, valued the franchises at less than the difference between the value of the property taxed and the market or selling value of the stock. But this contention disregards the fact that, by the agreed statement, it was expressly admitted that the assessment in question was illustrative of the assessments upon the other state banks and moneyed corporations. In view of the issues in the cause, as to which the facts were agreed, to say that the assessment in question only illustrated the case of the Bank of California would require us to disregard the agreed statement.

Finally, it is contended that, even if the state banks and other state moneyed corporations were assessed as illustrated by the

valuation placed on the Bank of California, the complainant national bank has no reason to complain because the assessment put upon its shares of stock was relatively no higher than that put upon the Bank of California, and therefore no discrimination was occasioned. This is predicated upon the fact that the value per share affixed to the stock of the complainant national bank was not higher, having sole reference to the value of the stock as shown by the book value of the assets, and, considering allowable deductions, than was the assessment put upon the Bank of California, considering, alone, the same elements. But there is no proof whatever that the stock of the complainant bank had a market or selling value higher than the value affixed to it by the assessor; and the items which were made the basis of the assessment against the stock are declared in the agreed statement to be the entire assets of the bank, and in the argument at bar on behalf of the assessor the value of the shares of stock of the bank in excess of their book value is assumed to have been only nominal. The proposition, therefore, comes to this,—although the complainant national bank was assessed at the full value of its stock, there was no discrimination in favor of the state bank, albeit there was a difference in excess of $2,000,000 between the value put upon the property and franchise of the state bank and the sum which should have been levied against it, if all the elements had been assessed which enter into the value of shares of stock. And, thus analyzed, the contention is again reducible to this proposition,—that, where property of one person worth a given amount is assessed for its full value, no discrimination in favor of another results when the latter is assessed for a sum greatly below the value of the property assessed.

What has just been said disposes, also, of the contention that, if the national bank had been assessed under the state law by the rule applied to state banks, it would have had affixed to its property a slightly higher valuation than was given as the value of the shares of its capital stock. Without stopping to point out the error in the calculation by which this result is supposed to be demonstrated, it suffices to say that the contention would have merit only in the event that the property and franchise of all state banks had no higher value than the book value of the shares of stock. The fallacy underlying the whole contention cannot better be

made clear than by the mere reiteration of the statement that, under the facts as agreed, it is obvious that the shares of stock of the national bank were assessed for all they were worth under the rule of market or selling value, whilst the state bank was only assessed for $750,000 above the book value of the stock, although the cash, selling, or market value would have required an assessment of nearly $3,000,000.

Many contentions were argued at bar involving the assertion that the state law was invalid because of deductions of debts or exempt property which, it was asserted, the law allows to state banks and other moneyed corporations on an assessment of their property, and does not allow holders of shares of stock in national banks. Most of these contentions are, in effect, disposed of by the consideration which we have given to the proposition that the state law was void simply because it established different methods of taxation as to the two classes of corporations. In so far as the contentions referred to are not, in effect, disposed of by our conclusions on that subject, we content ourselves with saying that we think all such propositions were rightly decided by the court below to be without merit, for the reasons expressed in the opinion delivered by that court in the *Nevada Bank Case,* to which the court referred, and upon which it placed its rulings. We decide this case solely upon the record before us. Our conclusion, therefore, does not deny the power of the state of California to assess shares of stock in national banks, provided only the method adopted does not produce the discrimination prohibited by the act of Congress. From this, of course, it would follow that, if the statutes of California, either from their text or as construed by the highest court of that state, compelled the assessing officers in the valuation of the property of state banks and other state moneyed corporations to include all those elements of value which are embraced in the assessment of shares of stock in national banks so that there would be an equality of taxation as respects national banks, the discrimination which we find to exist under the present state of the law of California would disappear.

The decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed, and the cause is re-

manded to the Circuit Court for further proceedings in conformity with this opinion.

Mr. Justice BREWER, with whom the CHIEF JUSTICE, Mr. Justice BROWN, and Justice PECKHAM concur, dissenting:

I am unable to concur in the foregoing opinion, and, believing that a grievous wrong is done to the state of California, will state the reasons for my dissent. Section 5219, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3502), prescribes the conditions and limitations of state taxation of national banks. In reference to it, we said in *Owensboro Nat. Bank* v. *Owensboro,* 173 U. S. 664, 669, 43 L. ed. 850, 852, 19 Sup. Ct. Rep. 537, 539:

"This section, then, of the Revised Statutes is the measure of the power of a state to tax national banks, their property, or their franchises. By its unambiguous provisions, the power is confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank."

By the section two restrictions, and two only, are placed on the power of the state to tax the shares of stock: "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere."

No uniform rule is prescribed by Congress as to the mode of assessment or the manner in which the state shall impose its burden of taxation on the shares of stock in national banks. Each state is left to determine that according to its own judgment. All that is demanded is that in fact neither the rate of tax nor the assessment shall discriminate against national banks, and that the property subject to taxation shall not be burdened in excess of the burdens cast upon other moneyed capital. *Davenport Nat. Bank* v. *Board of Equalization,* 123 U. S. 83, 31 L. ed. 94, 8 Sup. Ct. Rep. 73.

The mandate of § 1 of the Constitution of California is:

"All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys,

credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

Thus, the Constitution requires the taxation of all property and a taxation in proportion to its value, and defines property as including everything capable of private owership. Certainly, if the mandate of the Constitution is expressed in the statutes the shares of stock in national banks will be subjected to the same rate of taxation as all other property in the state, including therein moneyed capital. It must, therefore, be held that the legislation respecting the taxation of national bank shares is in defiance of the state Constitution before it can be adjudged in conflict with the equality provision of § 5219, Rev. Stat. Or, in other words, thaat the legislature of California disregarded the requirements of their own Constitution in order to subject to taxation property protected by Federal laws.

The legislation of California in this regard is found in § 3608 of the Political Code, as amended in 1899, and two additional sections enacted in that year, numbered 3609 and 3610:

"3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations, save and except the property of national banking associations not assessable by Federal statute, shall be assessed and taxed. But no assessment shall be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute.

"3609. The stockholders in every national banking association, doing business in this state, and having its principal place of business located in this state, shall be assessed and taxed on the value of their shares of stock therein; and said shares shall be valued and assessed as is other property for taxation, and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town, and county where such national banking association is located, and not elsewhere, whether the said stockholders reside in said place, city,

town, or county, or not; but, in the assessment of such shares, each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the provision of paragraph 6 of § 3629 of the Political Code of the state of California. In making such assessment to each stockholder, there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state.

"3610. The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholders of such assessment shall be necessary for the purpose of this act. And, in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien, prior to all other liens, on his said stock, and the dividends and earnings thereof, for the reimbursement to it of such taxes so paid."

The rule of valuation is prescribed by the 5th subdivision of § 3617 of the Political Code, which provides that "the terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor." It is true that prior to 1881 market value was made the rule of valuation, but the section prescribing that rule was, so far as it applied to national bank shares, adjudged void by the supreme court of the state *(Miller* v. *Heilbron,* 58 Cal. 133), and wholly

repealed by the legislature (Stat. 1881, p. 59), and in lieu of that the present rule of valuation established. But the rule of valuation is not so material, and, doubtless, an established market value would be the amount at which property would be taken in payment of a just debt due from a solvent debtor. The main thing is that the same rule of valuation shall be applied to the assessment and taxation of national bank shares as of other moneyed capital. And the express declaration of § 3609 is that the shares in national banks "shall be valued and assessed as in other property for taxation."

From the sections quoted it appears that the method of reaching the property of state corporations for purposes of taxation is by treating the corporation as owner of all, and casting the burden of taxation directly upon it, while, on the other hand, in obedience to the requirements of the Federal statute, taxation in respect to national banks is limited to an assessment and taxation of the shares of stock. But there is no discrimination if the same property is reached by each method, and by each subjected to the same rule of valuation. By § 3608 all the property of state corporations must be assessed and taxed, and the word "property" is defined by the Constitution to include, not merely tangible assets, but also "franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." Everything, therefore, which is a part of the property of a state corporation is subject to assessment and taxation. No other or larger burden is cast upon shares of national banks, and surely there can be no discrimination when the entire property in the one instance is taxed as a whole to the corporation and in the other instance subdivided and taxed to the stockholder. The whole is neither less nor more than all its parts. But it is said there is no specific command to include in the property of a state corporation the good will, dividend-earning power, and the like, and that they are necessarily included in the selling value of the stock of any corporation. It is true, these items are not in terms mentioned, but neither are desks and furniture. The language is general, so general that it includes everything, not excepting good will, dividend-earning power, and the like, for they are "capable of private ownership." They belong to the corporation. There is no good will in a share

of stock over and above the good will which belongs to the corporation, and, if the corporation sells and conveys all that it possesses "capable of private ownership," it sells and conveys its good will, and there is nothing left of good will or anything else belonging to the stockholders. This is so plain that he who runs may read. It is hardly necessary in a matter so clear to refer to the decisions of the supreme court of California, and yet they are direct upon the proposition. Thus in *Burke* v. *Badlam*, 57 Cal. 594, the court said (pp. 601, 602):

"Now, what is the stock of a corporation but its property, consisting of its franchise and such other property as the corporation may own? Of what else does its stock consist? If all this is taken away, what remains? Obviously nothing. *When, therefore, all of the property of the corporation is assessed,—its franchise and all of its other property of every character,—then all of the stock of the corporation is assessed, and the mandate of the Constitution is complied with.* This property is held by the corporation in trust for the stockholders, who are the beneficial owners of it in certain proportions called shares, and which are usually evidenced by certificates of stock. The share of each stockholder is undoubtedly property, but it is an interest in the very property held by the corporation. It is his right to a proportionate share of the dividends and other property of the corporation,—nothing more. When the property of the corporation is assessed to it, and the tax thereon paid, who but the stockholders pay it? It is true that it is paid from the treasury of the corporation before the money therein is divided, but it is substantially the same thing as if paid from the pockets of the individual stockholders. To assess all of the corporate property of the corporation, and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each. As well might it be contended that the property of a partnership should be assessed to the firm, and, in addition, that the interest of each partner in the firm property should be assessed to him individually. If I have an interest in partnership property, my interest therein is prop-

erty. It is the right I have to share in the profits and property of the firm, in proportion to the interest I own. But my property rights are confined to the property held by the firm, just as the property rights of the stockholder in the corporation are confined to the property held by the corporation. In the case of a partnership, take away all the property of the firm, and I have no longer any property as a partner. In the case of the corporation, take away all of its property, which, it must be remembered, includes its franchise, and the shareholder no longer has any property. The cases are parallel. If in the one case it is competent to assess to the corporation all of the property held by it, and to the individual stockholders the respective interest owned by each therein, so must it be competent to assess to every partnership the property held by the firm, and to each individual partner his interest therein. It is clear to our minds that in the one case the partner, and in the other the stockholder, would be compelled to pay twice on the same property, which is neither required nor permitted by the Constitution. *In the case of corporations to which we have referred the legislature has declared that all of the property held by such corporations shall be assessed to them. It has not attempted to exempt any property from taxation not exempted by the Constitution itself, and, of course, could not do it if it had. It has only said that the property shall be assessed to the corporation, and shall not be again assessed for the same tax. This it had the right to say.*" (Italics in this and succeeding quotations are mine.)

It will be seen from this quotation that the court places partnerships on the same basis as corporations. If the partnership sells out its property, including its good will and its profit-earning power, which are part of its property under the constitutional definition of property, there is nothing left to the separate partners. The whole thing has passed to the purchaser, and in the same way when a corporation makes a sale. And to hold that the good will and profit-earning power must be specifically mentioned is to hold that the constitutional definition of property is insufficient; that good will and profit-earning power are not "capable of private ownership," or do not belong to the corporation. *Burke* v. *Badlam* was reaffirmed in *Bank of California* v. *San Francisco*, 142

Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832, decided since the decision of this case by the court of appeals. This case is very instructive. It was an action brought by the plaintiff, a state bank, to have an assessment of its franchise declared illegal and void, and to recover the amount paid by it under protest as taxes thereon. The contention of the plaintiff was that it did not own or possess any franchise whatever; that the only franchise in any way connected with it was the corporate franchise, the franchise of being a corporation, which was the property of the stockholders and not assessable or taxable to the corporation. It appears from the opinion that the assessor found that the aggregate value of the tangible property of the bank was $5,156,903.08, that the market value of all the shares of the capital stock was $8,100,000, and the difference between the two was by him ascertained and determined to be the value of the franchise of the bank. The state was not challenging the assessment, and, of course, no inquiry was made as to the propriety of an increase in the valuation.

In reply to the contention of the plaintiff, the court uses this language:

"It was said by the Supreme Court of the Unitetd States, in *Society for Savings* v. *Coite,* 6 Wall 594, 606, 18 L. ed. 897: 'Corporate franchises are legal entities vested in the corporation itself as soon as it is *in esse.* They are not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation, upon the possession of its franchises, and, whatever may be thought of the corporators, it cannot be denied that the corporation itself has a legal interest in such franchises.'

"If this corporate franchise is assessable as property, then, that it must be assessed to the corporation instead of the members or stockholders is clearly settled in this state by the decision in *Burke* v. *Badlam,* 57 Cal. 594, *where it was held that a stockholder could not be assessed upon his certificate of stock, inasmuch as his shares were simply an interest in the very property held by the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate.* See also Pol. Code, § 3608."

Again, referring to *Burke* v. *Badlam*, 57 Cal. 594, the court said (p. 285, L. R. A. p. 922, Am. St. Rep. p. 138, Pac. p. 836):

"This case necessarily involved the question as to the constitutionality of § 3608 of the Political Code, prohibiting the assessment of shares of stock to the holders thereof. Such shares being undoubtedly property, unless they were otherwise assessed, the section was clearly unconstitutional, in view of the provision of the Constitution requiring all property to be taxed. *According to the decision of the court they were under the law to be otherwise assessed—i. e., everything represented by the certificate was to be assessed to the corporation.*"

And again, on p. 289, L. R. A. p. 924, Am. St. Rep. p. 141, Pac. p. 838:

"Whether or not the whole difference between the aggregate market value of the shares of stock and the value of the tangible property—*viz.*, $2,943,096.92—was the value of the franchise, *the assessor certainly had the right to take the value of the shares into consideration in determining the value of the franchise; and, were we at liberty to review the judgment of the assessor and the board of equalization upon those matters, we could not say that an assessment of $750,000 thereon is unjust, or that it includes such elements as dividend or profit-earning power, or good will, which, it is claimed, should not be taken into consideration in determining the value of the property of the corporation. In this connection, it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders, a method of assessment which the state is at liberty to adopt,—in fact, bound to adopt,—unless such shares are otherwise covered by the assessment of the property of the corporation.*

"It is clear that, if the laws of this state properly express the intention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property."

"I have made these extensive quotations from the opinions of the supreme court of California, for in cases like this we follow the construction placed by the highest court of the state upon its

statutes. Obviously, that court construes them as including within the corporate property the aggregate value of all the shares of stock, and that, while they forbid the assessment and taxation of shares of stock in a state corporation, they require that all the value represented by those shares of stock be assessed and taxed against the corporation; so that, when you ascertain the value of a single share of stock, and multiply that by the number of shares in the corporation, you have the value of the corporate property subject to taxation.

After declaring that the prohibition of the assessment and taxation of shares was clearly unconstitutional, unless they were otherwise assessed, it added, referring to the case of *Burke* v. *Badlam,* "according to the decision of the court they were under the law to be otherwise assessed,—*i. e.,* everything represented by the certificates was to be assessed to the corporation." Now, if, as claimed, the shares represent, not merely the tangible property, but the franchise, the dividend-earning power, then, as stated, "everything represented by the certificates was to be assessed to the corporation." And this language is followed by the declaration, referring to dividends, profit-earning power, good will, etc.: "In this connection it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders, a method of assessment which the state is at liberty to adopt,—in fact bound to adopt,—unless such shares are otherwise covered by the assessment of the property of the corporation." Reference is made to the use of the word "if" in the last paragraph of the quotation, as though that implied a doubt as to the meaning of the state statutes. But surely that cannot be, in view of the prior declaration in the same opinion, that "everything represented by the certificates was to be assessed to the corporation." The paragraph is to be read as though it said that provided the laws of the state properly express the intention, as we have already held that they do, then the true value of the shares is an important element in determining the value of the corporate property. The same word "if" is used at the commencement of the second paragraph of the quotation "if this corporate franchise is assessable as property," in like manner, for the word "franchises" is found in the

constitutional definition of property, the paragraph preceding "if" declares that "the corporation itself has a legal interest in such franchises," and the very paragraph says that "the assessment of all the property of the corporation covered everything represented by the certificate." Certainly it seems to me there is no justification in torturing this word "if" as overthrowing all the clear declarations of the court, as well as implying a destruction of the plain letter of the statutes.

But great reliance is placed upon the admission, in the agreed statement of facts, "that the manner in which franchises of commercial banks and trust companies were assessed for said fiscal year ending June 30, 1901, by the assessor of the city and county of San Francisco, is illustrated by the case of the Bank of California, a banking corporation organized under the laws of the state of California." In the assessment of that bank the assessor did not add to the value of the tangible property the difference between that value and the market value of the capital stock, but a sum very much less. A tabular statement is also annexed, showing the financial condition during the year of the 178 state banks of California. It might be sufficient to say that the stipulation is satisfied by a conclusion that the assessor, in assessing state banks, generally added to the value of the tangible property something on account of the franchise,—we are not compelled to infer that the valuation of the tangible property of each bank he added $750,000, or even that he failed to add the full difference between the value of that property and that of the stock. Indeed, it does not appear from the tabular statement that the market value of the shares in a single state bank in California exceeded the value of its tangible property. So that, so far as that evidence goes, the only case in which there was any franchise value to be added was that of the Bank of California. But more significant is this: It appears from the agreed statement that the assessment complained of in this case was made in the following way:

"The defendant, in making his assessment, fixed the value of the shares for taxation at $104.35 each, and arrived at that valuation in the following manner: He added to the capital stock of the bank, $500,000, its undivided profits amounting to $77,260, deducted the face value of United States bonds held by it, $50,000,

and the value of its furniture, $5,500, leaving $521,760 as the total assessable value, and dividing that by the number of shares made the assessable value of each share the sum above stated."

In other words, the only assessment against the plaintiff's shares was based upon the value of the tangible property. Not a dollar was added to the valuation on account of franchise, good will, or dividend-earning power, or anything of that kind. Or, to put it in another form, the assessment of the state bank added to the value of the tangible property something for the value of the franchise, the assessment of the plaintiff stopped with the tangible property, and yet it is held that there was an actual unjust discrimination against the plaintiff. And how is this conclusion reached? By assuming that the shares in the plaintiff bank had no value above the value of the tangible property. But this is a mere assumption. A more rational guess would be that the shares of stock in a bank whose undivided profits were over 15 per cent of its capital had a value much above the par value of its stock or the value of its tangible property. And can it be that the whole system of the legislation of a state in respect to the taxation of national banks can be stricken down upon an unfounded assumption that the shares of a given national bank were worth no more than its tangible property? If the complaint was of an actual discrimination it was a part of the plaintiff's duty to prove it, and show that its shares had no value above that of the tangible property, and would not "be taken in payment of a just debt due from a solvent debtor" at a larger sum. The most elementary rule of judicial proceedings is that a party, to make out his cause of action, must prove, not assume, the existence of all essential facts.

But I need not rest upon the omission of proof. There is no allegation of any discrimination based upon such difference of valuation. The eleventh and twelfth paragraphs of the complaint state the wrongs on account of which relief is sought. In order that there may be no misunderstanding of the full scope of the causes of action alleged I quote these paragraphs entire:

"Eleventh.—That the said assessment and taxation, so as aforesaid threatened to be made and levied by the respondent upon the shares of the capital stock of your orator, will be in violation of, and repugnant to, the provisions of §§ 5219 and 1977 of the Re-

vised Statutes of the United States (U. S. Comp. Stat. 1901, pp. 1259, 3502), in that the said assessment and taxation will be at a greater rate than is or will be assessed upon other moneyed capital in the hands of individual citizens of the said state of California. And in that behalf your orator shows that, under and by virtue of the laws of the said state of California, all shares of stock in corporations organized under the laws of the said state and amounting to more than the sum of two hundred million dollars ($200,000,000), and especially in corporations organized under the laws of the said state for the purpose of banking, all shares of stock thereof amounting to more than the sum of thirty-five million dollars ($35,000,000), are expressly exempt from assessment and taxation, and the same are not subject thereto, and that the respondent has not assessed, and will not assess, for the said fiscal year ending June 30th, 1901, and does not intend to assess, to the holders of shares in corporations, organized under the laws of the said state of California, the value of the same, or to collect from such shareholders any taxes on said shares or the value thereof.

"And your orator further shows that the said pretended assessment and taxation so as aforesaid threatened to be made and levied by the respondent upon the shares of the capital stock of your orator will be in violation of, and repugnant to, the provisions of said § 5219 of the Revised Statutes of the United States, in that the said taxation will be at a greater rate than will be assessed upon any other moneyed capital in the hands of individual citizens in the state of California. And, in that behalf, your orator further shows that, in assessing and taxing the said shares of the capital stock of your orator, no deduction will, or can legally, be made from the valuation of said shares, or any of them, of debts unsecured by deed of trust, mortgage, or other lien on real or personal property due or owing by the stockholders of your orator, or by any of them, to bona fide residents of the state of California; and that, in assessing and taxing other moneyed capital in the form of solvent credits unsecured by deed of trust, mortgage, or other lien on real or personal property, due, or owing to, or in the hands of, individual citizens in said state of California, the respondent does and will make a deduction from said credits, under and by

the Constitution and laws of the state of California, of the debts unsecured by trust deed, mortgage, or other lien on real or personal property as may be owing by such individual citizens, or by any of them, to bona fide residents of the state of California, and that said threatened assessment and taxation of the shares of your orator is, and will be, unjust, unlawful, and illegal, and will discriminate against and upon such shares and against and upon the persons owning and holding the same, and will compel them to sustain and bear more than their just share and burden of the taxes of the said state of California. And in this behalf your orator further avers that it is informed and believes, and upon such information and belief states, the fact to be, that the amount of moneyed capital in the ctiy and county of San Francisco in said state of California on the first Monday of March, 1900, to wit, on March 5th, 1900, at noon of said day, invested by banks and bankers, having their principal place of business in said city and county, and residents therein, in unsecured solvent credits, and from which, under the Constitution and laws of said state, unsecured debts can be deducted, was the sum of $14,074,561; and on the day and year last aforesaid the amount of moneyed capital in the state of California, other than in the said city and county of San Francisco, invested by banks and bankers in unsecured solvent credits, and from which, under the Constitution and laws of said state, unsecured debts can be deducted, was the sum of $7,589,302; that on the day and year last aforesaid said banks and bankers at said city and county of San Francisco had debts unsecured by trust deed, mortgage, or other lien on real or personal property owing by such banks and bankers in said city and county, amounting to the sum of $36,710,062; and that on said day last aforesaid the amount of debts unsecured by trust deed, mortgage, or other lien on real or personal property owing by said banks and bankers in the state of California, other than in the said city and county of San Francisco, was the sum of $32,400,304; that the amount of moneyed capital invested in such solvent credits by such banks and bankers on the day and year last aforesaid, in said city and county of San Francisco and in said state of California, as compared with the amount of moneyed capital invested in the shares of the capital stock of your orator, is so large and substantial that the assess-

ment and taxation of the shares of the capital stock of your orator without deducting therefrom, and without being able to deduct therefrom, debts unsecured by trust deed, mortgage, or other lien on real or personal property, as may have been owing by the respective holders of the shares of the capital stock of your orator on the day and year last aforesaid, will be an illegal and unjust discrimination against the owners and holders of the shares of the capital stock of your orator, and will make the taxation of said shares of stock at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens in the state of California, and particularly in the city an county of San Francisco in said state. And in this behalf your orator further avers that the said solvent credits so held as aforesaid by banks and bankers in the said city and county of San Francisco and in the said state of California are moneyed capital in the hands of individual citizens of the state of California, which enter into competition for business with your orator.

"Twelfth.—That, in the making of the said assessment of the said shares of the capital stock of your orator, the respondent will not proceed in the manner directed by the said act of March 14th, 1899, in this: That the said respondent, as hereinbefore set out, will ascertain and determine the value of each of the shares of the capital stock of your orator to be the sum of $115,452, and will deduct therefrom the sum of $11.10 per share as the proportionate amount per share of the value of the United States bonds held by your orator to secure its circulation, and of its furniture, and will, as hereinbefore set out, assess to the stockholders the sum of $104.36 per share as the value of each share of said capital stock by the said respondent claimed to be subject to assessment and taxation under the provisions of said act of March 14th, 1899, and that the respondent will wholly fail and refuse to make any other or further deductions from such ascertained value of said shares, in order to determine the assessable value thereof; whereas, by the provisions of said § 3609 of the Political Code of the state of California, under and in pursuance whereof the respondent has threatened and intends to make the said assessment, and will proceed to demand, and will attempt to collect, the taxes aforesaid, he was and is required to deduct from the value of each

share of the capital stock of your orator such sum as is in the same proportion to such value as the total value of the real estate and property of your orator exempt by law from taxation bears to the whole value of all the shares of the capital stock of your orator. That on the first Monday of March, 1900, to wit, on March 5th, 1900, at twelve o'clock M. of said day, your orator had not, and thence hitherto has not had, nor has it now, any real estate, and, as in paragraph 'eighth' hereof averred, all of the property of your orator consisted on said day and at said time, and has thence hitherto consisted, and does now consist, of its bonds, money on hand, credits, furniture, and other personal property, and on said day and at said time the same constituted and were, and thence hitherto have been, and now are, the assets of your orator, and were and are used and employed by it in the conduct and carrying on its business as a national banking association under and by virtue of the provisions of the act of the Congress of the United States known as the national banking act, and were and are exempt by law from assessment and taxation. That, if deduction of all the property of your orator exempt from assessment and taxation as last aforesaid were made to each stockholder in assessing said stock, there would remain nothing of value subject to assessment and taxation; and that the pretended assessment and taxation of said shares at said value of $104.36 per share would be based wholly upon supposed and fictitious property, and upon property exempt by the Constitution and laws of the United States from assessment and taxation."

The first of these paragraphs alleges a violation of the Federal statute in the taxation of plaintiff's shares of stock, because under and by virtue of the laws of California all shares of stock in state corporations are exempt from assessment and taxation, and the assessor does not intend to assess to the holders the value of those shares. But, as repeatedly held, a mere difference in the methods of state and national bank taxation is not repugnant to the act of Congress. The balance of the paragraph is substantially a charge of a discrimination by reason of a failure to deduct debts. But that, it is conceded in the opinion of the court, may be put one side,—a concession undoubtedly compelled by the facts as agreed upon, for an opportunity was given to each stockholder in the

plaintiff bank to have any debts deducted, and no one of them sought to avail of this privilege.

The other paragraph charges a discrimination and that the assessor ascertained the value of the shares of the capital stock of the plaintiff at the sum of $115,452 and deducted therefrom the sum of $11.10 per share as the proportionate share of the value of United States bonds held by the bank; that he refused to make any further deductions, although the various items of property held by the bank, consisting of bonds, moneys, credits, etc., "were and are used and employed by it in the conduct and carrying on its business as a national banking association, under and by virtue of the provisions of the act of Congress of the United States known as the national bank act, and were and are exempt by law from taxation." The complaint here is that the tangible property of the national bank is wholly exempt from taxation because used for the purpose of carrying on the banking business, and, as the only assessment of plaintiff's shares was based upon the value of the tangible property, the entire assessment was void. Now, it is not pretended in the opinion of the court, nor can it be successfully claimed in view of prior decisions of this court, that shares of stock in a national bank are subject to taxation to only the extent of the excess of their value above that of the tangible property of the corporation, and yet that is the burden of plaintiff's complaint. I have made this extensive quotation because it is apparent therefrom that the matter which, in the judgment of the court, is sufficient to overthrow the law of California in respect to the taxation of national banks, was not charged or complained of by the plaintiff. If the plaintiff neither alleges nor proves any discrimination in the matter of valuation I cannot understand why this court should assume that there was one, and thereupon upset the tax.

Further, there is no reference in the opinion of the court of appeals to any discrimination in fact.

Still further, counsel for plaintiff in error evidently fail to perceive any actual discrimination, as appears by this quotation from their brief:

"The questions involved in the appeal are:

"(1) That the act of 1899, providing for the assessment and

taxation of shares of the capital stock of national banks, is repugnant to the provisions of § 5219 of the Revised Statutes of the United States:

"*(a)* Because shares of stock in the commercial banks of the state are not taxed, and are exempt;

"*(b)* Because, by reason of the failure to tax shares in the commercial banks of the state, the shares of national banks are subjected to an adverse discrimination, and taxed at a higher rate than such commercial bank shares;

"*(c)* Because the provisions § 3609, are wholly void, in that it is thereby undertaken to provide that a stockholder may deduct from the value of his shares the amount of his debts due to bona fide residents of the state.

"(2) That, under the express provision of the Political Code, §§ 3608 and 3609, the whole property of the appellant included in the assessment was exempt from taxation."

The only reference to discrimination is the alleged legal one, "by reason of the failure to tax shares in the commercial banks of the state." If the failure to tax shares in the commercial banks of the state does not of itself work a discrimination, as is practically conceded in the opinion of the court, then the whole basis of plaintiff's complaint fails.

Summing the matter up, the Constitution declares that "all property . . . shall be taxed in proportion to its value," and defines "property" as including "franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." Franchises, dividend-earning, profit-earning power, are capable of private ownership. Indeed, the opinion of the court is based on the contention that they are assessed to the holder of shares in national banks, and not assessed upon the state banks. Section 3608 provides that "all property belonging to corporations (save and except the property of national banking associations, not assessable by Federal statute) shall be assessed and taxed." Section 3609, that the shares in national banking associations "shall be valued and assessed as is other property for taxation." The supreme court of the state holds that a stockholder in a state bank "could not be assessed upon his certificate of stock, inasmuch as his shares were simply an interest in the very property held by

the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate." [142 Cal. 282, 64 L. R. A. 920, 100 Am. St. Rep. 135, 75 Pac. 835.] There is neither allegation nor evidence that there was any overvaluation of the plaintiff's shares of stock. The complaint is that there was a discrimination by reason of the failure to deduct from the value of the shares of the entire value of the bank's tangible property, because "used and employed by it in the conduct and carrying on its business as a national banking association." And yet, in the face of the plain words of the Constitution and statutes, the clear language of the supreme court of California, and the absence of allegation or proof of actual discrimination, this court, by its opinion, strikes down the whole system of California for the taxation of shares of national banks.

But beyond and aside from the matters which I have considered, and conceding, for the purposes of the following suggestion, that the law of California providing for the taxation of shares of stock in national banks is invalid, still I insist that the decree of the court of appeals ought to be affirmed. This is an equitable suit brought in the United States court, where the distinction between law and equity is constantly enforced. Upon the theory of the opinion, the tax upon the shares of stock in the plaintiff bank was illegal. The statute of California imposing that tax was void. Now, there are two propositions which have entered into the jurisprudence of this court so thoroughly that they may be regarded as settled laws. First, that equity will not interfere where there is a plain, adequate, and complete remedy at law; and, second, that injunction will not issue to restrain the collection of a tax simply on the ground of its illegality. The first is not only the rule of the court of chancery in England, but it is the command of the Federal statute. Section 723, Rev. Stat. [U. S. Comp. Stat. 1901, p. 583], reads: "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

This defense was pleaded by the defendant in his answer, the sixteenth paragraph of which reads as follows:

"And respondent further submits to this honorable court that complainant has a full, complete, speedy, and adequate remedy at

law against respondent for all causes of action, or causes of actions, stated or attempted to be stated in complainant's bill of complaint on file in this action; and he here claims the same benefit of the objection as if he had not demurred to the relief so sought."

Even if it had not been formally pleaded, the matter is one which this court of its own motion would consider and determine. As said in *Wright* v. *Ellison,* 1 Wall. 16, 22, 17 L. ed. 555, 557:

"But this is a suit in equity. The rules of equity are as fixed as those of law, and this court can no more depart from the former than the latter. Unless the complainant has shown a right to relief in equity, however clear his rights at law, he can have no redress in this proceeding. In such cases the adverse party has a constitutional right to a trial by jury. The objection is one which, though not raised by the pleadings nor suggested by counsel, this court is bound to recognize and enforce."

It is unnecessary to cite the many cases in this court in which this rule has been recognized, the latest being *Scottish Union & Nat. Ins. Co.* v. *Bowland,* the opinion in which has just been filed though reference may be made to the discussion by Mr. Justice Field in *Whitehead* v. *Shattuck,* 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276, and in *Scott* v. *Neely,* 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712, and by Mr. Justice Brown in *Wehrman* v. *Conklin,* 155 U. S. 314, 39 L. ed. 167, 15 Sup. Ct. Rep. 120. Now, in California there is a perfectly adequate legal remedy for cases of this nature. Section 3819 of the Political Code provides that "the owner of any property, . . . who may claim that the assessment is void in whole or in part, may pay the same to the tax collector under protest, which protest shall be in writing, and shall specify whether the whole assessment is claimed to be void, or, if a part only, what portion, and in either case the grounds upon which such claim is founded; and when so paid under protest the payment shall in no case be regarded as voluntary payment, and such owner may at any time within six months after such payment bring an action against the county in the superior court, to recover back the tax so paid under protest." Such a remedy has, in a case of the taxation of national bank shares, been held by this court adequate and complete, and sufficient to exclude the interposition of a court of equity. In *Dows* v. *Chi-*

cago, 11 Wall. 108, 20 L. ed. 65, which was a bill filed by the owner of shares of the capital stock of the Union National Bank of Chicago, to restrain the collection of a tax levied by that city upon his shares, we said (p. 112, L. ed. p. 67):

"The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal courts, where there is a plain and adequate remedy at law. And, except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

And this case was reaffirmed by the unanimous opinion of this court in the late case of *Pittsburgh, C. C. & St. L. R. Co.* v. *Board of Public Works,* 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90, in which the quotation I have just made is also quoted.

The second proposition to which I have referred has also been often decided. Out of the many decisions I refer to only two or three. *Dows* v. *Chicago,* 11 Wall. 108, 20 L. ed. 65, in which is this language (p. 109, L. ed. p. 66):

"Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked."

State Railroad Tax Cases (Taylor v. *Secor),* 92 U. S. 575, 23 L. ed. 663, in which is this (p. 614, L. ed. 673):

"We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

And in *Pittsburgh, C. C. & St. L. R. Co.* v. *Board of Public Works,* 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90, in which the rule is thus stated (p. 37, L. ed. p. 356, Sup. Ct. Rep. p. 92):

"The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction."

But it may be said that in the following cases this court has laid down an apparently different rule in respect to the taxation of national bank shares. *New York* v. *Weaver,* 100 U. S. 539, 25 L. ed. 705; *Pelton* v. *Commercial Nat. Bank,* 101 U. S. 143, 25 L. ed. 901; *Cummings* v. *Merchants' Nat. Bank,* 101 U. S. 153, 25 L. ed. 903; *Hill* v. *National Albany Exch. Bank,* 105 U. S. 319, 26 L. ed. 1052; *Evansville Nat. Bank* v. *Britton,* 105 U. S. 322, 26 L. ed. 1053; *Lander* v. *Mercantile Nat. Bank,* 186 U. S. 458, 46 L. ed. 1247, 22 Sup. Ct. Rep. 908. The first was a writ of error to the court of appeals of the state of New York, and, the mode of attack upon the law having been recognized by that court as proper, the question was not discussed here. In *Cummings* v. *Merchants' Nat. Bank, Pelton* v. *Commercial Nat. Bank* being decided on its authority, the right to an injunction was asserted. The case came from the circuit court of the United States for the northern district of Ohio, in which district the bank was located. In delivering the opinion of the court Mr. Justice Miller said on page 157:

"*But the statute of the state expressly declares* that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them. Section 5848 of the Revised Statutes of Ohio, 1880, vol. 53, Laws of Ohio, 178, §§ 1, 2. And though we have repeatedly decided in this court that the statute of a state cannot control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that, *where a statute of a state created a new right or provided a new remedy, the Federal courts will enforce that right, either on the common-law or equity side of its docket, as the nature of the new right or new remedy requires. Van Norden* v. *Morton,* 99 U. S. 378, 25 L. ed. 453. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute, is to be enforced, and can only be appropriately enforced on the equity side of the court.

"The statute also answers another objection made to the relief sought in this suit, *namely, that equity will not enjoin the collection of a tax except under some of the well-known heads of equity jurisdiction,* among which is not a mere overvaluation, or the illegality of the tax, or in any case where there is an adequate remedy at law. The statute of Ohio expressly provides for an injunction against the collection of a tax illegally assessed, as well as for an action to recover back such tax when paid, showing clearly an intention to authorize both remedies in such cases.

"Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is *designed* to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

Two reasons are here stated to justify the exception to the ordinary rule in respect to injunctive relief. First, a state statute, and, second, a design on the part of the state authorities to discriminate. There is no statute of California making such special provision in reference to injunctions, and that reason for a departure from the general rule may be put one side. The other

implies an intent on the part of the legislature or assessing officials to discriminate. It does not mean simply that there has resulted a discrimination, but that one was intended. It is well known that in the early days of the national banking law there was a strong prejudice against it in different portions of the Union, and adverse legislation in the way of burdensome taxation was not uncommon, and it was because of that fact that the court permitted the exercise of the strong powers of equity. That I am right in this, and that there has never been an intent to apply a different rule to a national bank from that which has been in force in respect to other property, is made clear by the language of Mr. Justice Miller in a subsequent case, *German Nat. Bank* v. *Kimball,* 103 U. S. 732, 735, 26 L. ed. 469, 470. Delivering the opinion of the court, he says:

"An apparent exception to the universality of the rule is admitted in *People* v. *Weaver,* 100 U. S. 539, 25 L. ed. 705; *Pelton* v. *Commercial Nat. Bank,* 101 U. S. 143, 25 L. ed. 901, and *Cummings* v. *Merchants' Nat. Bank,* 101 U. S. 153, 25 L. ed. 903. It is held in these cases that when the inequality of valuation is *the result of a statute of the state designed to discriminate injuriously* against any class of persons or any species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments *combine together and establish a rule or principle of valuation,* the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations which establish no rule on the subject."

This ruling was somewhat like the action of the court in *Stanley* v. *Schwalby,* 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754. That was a case coming from a state court. Ordinarily when the judgment is reversed the order is to remand the case for further proceedings not inconsistent with our opinion; but, in view of action theretofore taken by the state court in the

case, we felt constrained to direct the very judgment which should be entered.

In *Lander* v. *Mercantile Nat. Bank*, 46 L. ed. 1247, 22 Sup. Ct. Rep. 908, a decree dismissing the bill filed by the bank was affirmed. It is true in the opinion the merits of the bill were discussed, and nothing said about the right to maintain a suit in equity. Evidently the matter passed without consideration, and not unnaturally so, as the bill on its merits was dismissed.

In the case before us, whatever may be the effect of the statute in creating or opening the door to discrimination, no one can read it and say that there was an intent on the part of the legislature of California to discriminate injuriously against national banks. The statute is positive in its language that national bank shares shall be taxed and assessed as its other property, and there was beyond doubt an attempt on the part of the California legislature to cast only an equal burden of taxation on such shares. Of course, there ought not to be imputed to this court an intention to favor national bank property in the matter of taxation, and to lay down a rule for its benefit which is denied to all other property. So, were I wrong in my construction of the state statute, beyond any peradventure the decree of the circuit court of appeals ought to be affirmed and the bank remitted to its legal remedy.

I am authorized to say that the CHIEF JUSTICE, Mr. JUSTICE BROWN, and Mr. JUSTICE PECKHAM concur in this dissent.